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Supreme Court, U.S.
FILED

No. 06- 06-499 OCT 5 - 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

STEVEN C. MORRISON,

Petitioner,

v.

BOARD OF LAW EXAMINERS
OF NORTH CAROLINA et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state constitutionally condition its willingness to allow a lawyer to be admitted to practice without taking a bar examination be based on the willingness of the state in which that lawyer is already admitted, and in which that lawyer has been recently practicing, to reciprocate for lawyers from the admitting state?

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner, Steven C. Morrison, and the respondent, Board of Law Examiners of North Carolina, Fred P. Parker III, who is the executive director of the Board, and the following members of the Board and their successors in interest were parties to the proceedings below and are respondents in this Court: Susan Freya Olive; Thomas W. Steed, Jr.; Karl Adkins; Edward J. Harper, II; Gail C. Arneke; Robin L. Tatum; Catherine E. Thompson; William K. Davis; Roy W. Davis, Jr.; Emil F. Kratt; and Shirley Fulton.*

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* Counsel of record for petitioner and petitioner have the same last name, but they are not related.

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The opinion of the court of appeals (App. 1-9) is reported at 453 F.3d 190 (4th Cir. 2006). The opinion of the district court (App. 10-26) is reported at 360 F. Supp. 2d 751 (E.D.N.C. 2005). The order of the court of appeals denying rehearing and rehearing en banc (App. 27-28) is not reported.

JURISDICTION

The decision of the court of appeals was issued on June 15, 2006. A timely petition for rehearing and rehearing en banc was denied on July 12, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND RULES AT ISSUE

North Carolina General Statute § 84-24 is reproduced in the appendix to the petition (App. 33-36). The relevant portion is as follows:

> For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the Council, who need not be members of the Council.
>
> . . .
>
> The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the

> applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law.
>
> . .
>
> The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.
>
> All rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the Council.

Rule .0502 of the North Carolina Board of Law Examiners provides for the admission without examination of lawyers licensed in other jurisdictions. It is reproduced in the appendix to the petition (App. 29-32). The relevant portion of Rule .0502(3), which imposes the limits on admission without examination that are at issue in this case, is as follows:

> (3) [An applicant for admission without taking the bar exam shall prove] to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein,

> the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law.

STATEMENT OF THE CASE

This case challenges the constitutionality of provisions found in the statutes or rules of 23 states under which the right of a lawyer seeking admission to the bar of one of those states without taking the bar exam is conditioned on the willingness of the state from which that lawyer is already admitted to grant reciprocal rights to lawyers from the admitting state. The court of appeals upheld North Carolina's reciprocity requirement, referred to as "comity" there. This Court should grant review because that ruling is inconsistent with this Court's decision in *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976), and its progeny, all of which reject reciprocity as a basis for excluding persons seeking a license or other advantage in the state that imposed such a requirement.

A. Bar Admission Rules in North Carolina.

Like almost every state, North Carolina requires a person seeking to practice law to pass a bar exam and establish his or her moral character and fitness to practice law, unless the person qualifies for admission without examination. Section 84-24 of the North Carolina statutes creates the Board of Law Examiners ("BLE"), whose 11 members are lawyers elected for three year terms by the

Council of the North Carolina Bar.[1] The Council, which governs the Bar, is comprised of 55 lawyers who are elected by members of the Bar, plus three public members appointed by the Governor and the elected officers of the Bar. *See* N.C.G.S. § 84-17. Section 84-24 provides that the BLE, "subject to the approval of the Council," shall issue rules that "promote the welfare of the State and the profession." That section also gives the BLE "full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law. . . ." There is no provision for any court in North Carolina to approve such rules, although section 84-24 does require that BLE rules approved by the Council be transmitted to the North Carolina Supreme Court for entry in its minutes and appropriate publication, unless, pursuant to section 84-21, the Chief Justice finds a rule to be "inconsistent with this article."

Pursuant to this authority, respondents have promulgated Rule .0502, entitled "Requirements for Comity Applicants," which allows certain applicants who are members of bars of some other states to be admitted without taking the North Carolina bar examination. There are a number of requirements for this exception, some of which are designed to assure the BLE that the applicant is qualified to practice law. The only provision at issue here is the two-part reciprocity requirement of subsection (3).

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[1] For ease of reference, the BLE, its executive director, and its current and past members will be referred to collectively as respondents or the BLE.

Under it, an applicant must first be licensed in a jurisdiction "having comity with North Carolina"; second, the applicant must have "been for at least four out of the last six years, immediately preceding the filing of this application with the [BLE], actively and substantially engaged in the full-time practice of law" in a jurisdiction having comity with North Carolina. That subsection goes on to define what constitutes the practice of law which includes (c) service as corporate counsel; (d) judicial service, with any federal, state or local court; (e) service as a member of the Judge Advocate General's Department in any branch of the military ("JAG"), "whether or not such service is in the jurisdiction in which the applicant is duly licensed," and (f) being a full-time faculty member at a law school approved by the Council. App. 30-31. Furthermore, the Rule allows an applicant to count a number of activities performed in North Carolina as having been performed in the comity jurisdiction for purposes of the "four of the last six years" requirement, including service as house counsel, full-time employment on a law school faculty or at the Institute of Government of the University of North Carolina at Chapel Hill, and JAG service. *Id.* at 31. These latter provisions have the further effect of removing any doubt that a lawyer not admitted to the North Carolina bar may engage in such activities in North Carolina without engaging in the unauthorized practice of law.

B. Petitioner's Application.

Petitioner graduated from the Indiana University Law School in 1979 and was admitted to the Indiana bar in May 1979 after passing the Indiana bar exam. In 1981, he took and passed the Ohio bar exam and became a member of that bar, and for the next three years he had offices and

practiced law in both states. In 1985, when his work took him to California, he took and passed the California bar and practiced law there until July 2000 when, at the request of a longtime client, he moved to North Carolina, where he served as the chief legal officer for a Raleigh-based software company. When the company was sold in 2003, petitioner lost his job and decided for family reasons to stay in North Carolina and practice law there.

When petitioner attempted to file his application for admission without examination in late 2003, it was rejected because of the reciprocity provisions in Rule .0502(3). Although both Indiana and Ohio have "comity" with North Carolina (*i.e.*, they will admit North Carolina lawyers without examination), California does not. The Rule requires that an applicant not only be licensed in a comity state, but that the applicant must have been actively practicing in a comity state for four of the past six years. Because petitioner had been practicing in California for the first three years and in North Carolina for the next three years, petitioner's Indiana and Ohio bar memberships did not suffice, even though both are comity states. Therefore, the BLE refused to process his application for admission without taking the bar examination because of his failure to satisfy the reciprocity requirements of Rule .0502(3).

C. The Litigation.

On February 11, 2004, petitioner commenced this action under 42 U.S.C. § 1983 against the BLE, its executive director, and its 11 members. Jurisdiction was based on 28 U.S.C. § 1343. Petitioner's claim was that the reciprocity provision, Rule .0502(3), violated the United

States Constitution and, therefore, respondents could not reject his application for admission without examination based on that Rule.

Respondents moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), accompanied by a short affidavit of respondent Fred Parker, the Executive Director of the BLE. App. 38-41. The affidavit raised no issues of fact and made it clear that petitioner's failure to comply with the Comity Rule was the sole basis for the BLE's refusal to accept his application. Paragraph 4 of the Parker affidavit sets forth the purposes of the Rule, and, although they are not contained in the Rule itself or any other statement by the BLE submitted to the court below, petitioner does not dispute that the affidavit reflects the BLE's purposes. Most of these purposes relate to the need to assure that applicants are qualified and fit to practice law in North Carolina and are subject to other requirements in the Rule beyond the reciprocity aspect of subpart (3). The one purpose that does relate to reciprocity is reason (g), which is to "facilitate interstate travel by encouraging other states to admit North Carolina attorneys without taking a bar examination." App. 39. Notably, the affidavit contains no reason that would justify the requirement that four out of the last six years of active practice must be in a state with which North Carolina has comity, even though that was why petitioner's application was rejected by the BLE.

Petitioner submitted his own affidavit and cross-moved for summary judgment. After hearing oral argument, the district court issued an opinion in which it rejected petitioner's challenge to the basic comity requirement because petitioner satisfied it through his admission in Indiana and Ohio. However, the court found that the

portion of the Rule that required that petitioner not only be from a comity state, but that he have practiced for four of the last years in that state was unconstitutional. Respondents filed an appeal to the Fourth Circuit and, in an excess of caution, petitioner filed a cross-appeal from the portion of the district court decision rejecting his challenge to the reciprocity rule as a whole.

The court of appeals reversed the district court and ordered the complaint dismissed. Relying on its prior decision in *Hawkins v. Moss,* 503 F.2d 1171 (4th Cir. 1974), *cert. denied,* 429 U.S. 928 (1975), which antedates this Court's series of decisions dealing with exclusionary bar admission rules discussed *infra* at 12-13, as well as this Court's decisions striking down state laws with reciprocity provisions virtually indistinguishable from this one, *infra* at 9-10, the court upheld the reciprocity requirement by finding that the desire to assist North Carolina attorneys gain admission elsewhere satisfied the minimum standards of rationality that the court thought applied in this situation. Although the district court had struck down only the "four of the last six years" portion of the reciprocity rule, the court of appeals did not explain the basis on which it upheld that particular provision. A timely petition for rehearing was denied, and this petition followed.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts with Decisions of This Court.

The only case cited by the Fourth Circuit in upholding North Carolina's reciprocity requirement was its 1974 ruling in *Hawkins v. Moss, supra.* However, subsequent to

Hawkins, this Court was presented with Commerce Clause challenges to reciprocity statutes substantively indistinguishable from Rule .0502(3), and in each case found them unconstitutional. The first of these cases was *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 368 (1976) ("*A&P*"), where a challenge was brought to a Mississippi law that allowed the importation of milk that was found acceptable in other states, but rejected milk from Louisiana "solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi as required by the regulation." The Court found that "Mississippi's contention that the reciprocity clause serves its vital interest in maintaining the State's health standards borders on the frivolous" because Mississippi would allow Louisiana milk to come in "even if Louisiana's standards were lower than Mississippi's" so long as the reciprocity provision were satisfied. *Id.* at 375. In rejecting an effort to characterize the regulation as one that enhanced trade by eliminating hypothetical barriers from other states, the Court observed that a state "may not use the threat of economic isolation as a weapon to force sister states to enter into even a desirable reciprocity agreement." *Id.* at 379.

Two other decisions of this Court reached identical conclusions regarding other statutes containing specific reciprocity requirements. The Nebraska law at issue in *Sporhase v. Nebraska,* 458 U.S. 941 (1982), forbade the taking of ground water into another state unless the other state allowed its water to be taken into Nebraska. Petitioner, whose property straddled the Nebraska-Colorado line, had been denied a permit to pump water from the Nebraska portion of his land for use in irrigating land in Colorado, because Colorado had no reciprocity agreement

with Nebraska that would allow its water to be pumped into Nebraska. In setting aside the reciprocity provision, this Court observed that it "operates as an explicit barrier to commerce between the two States," and that "there is no evidence that this restriction is narrowly tailored to the conservation and preservation [of water] rationale" advanced by the state. *Id.* at 957-58.

Finally, in *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269 (1988), Ohio offered a tax credit on each gallon of ethanol sold, but only if it were produced in Ohio or in a state that granted similar tax credits to ethanol produced in Ohio. The appellant was an Indiana corporation that produced ethanol in Indiana and sold it in Ohio. At one time, Indiana had a tax credit provision that would have satisfied Ohio's reciprocity rule, but it had been repealed and replaced with a direct subsidy to Indiana producers. Ohio claimed that "far from discriminating against interstate commerce, [its law] is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol," but the Court rejected that defense, relying on its earlier reciprocity decision in *A&P.* As the Court observed, the Ohio law could not be justified on the theory that "the reciprocity requirement is designed to increase commerce in ethanol by encouraging other States to enact ethanol subsidies." *Id.* at 280.

There is a further decision of this Court, which, although not dealing with a statute that had a provision bearing a comity or reciprocity label, addressed a state law that resulted in the same kind of discriminatory treatment and met a similar fate of unconstitutionality, there under the Privileges or Immunities Clause of the Fourteenth Amendment. The case is *Saenz v. Roe,* 526 U.S. 489 (1999),

and the law at issue provided that persons who had lived in California for fewer than twelve months would be entitled to receive welfare benefits no greater than the benefits to which they would have been entitled in their former state of residence. Although written differently, the law was the functional equivalent of a reciprocity provision: if a new resident's former State paid 80% of what California paid, she would receive that 80%, and not what she would have received had she been a California resident for all of that twelve months. California did not seek to justify the law on the ground that it was designed to encourage other states to raise their welfare benefits to the level of California's – so that if California residents went to those other states, they would not suffer a loss in benefits – but if it had, that theory would have been rejected based on the reciprocity trilogy discussed above.

The Fourth Circuit cited no case other than *Hawkins v. Moss* in concluding that North Carolina's reciprocity rule was constitutional. It quoted the portion of *Hawkins* in which the court observed that reciprocity statutes have been uniformly held to "meet a legitimate state goal" and "found invulnerable to constitutional attack" (App. 7, *quoting* 503 F.2d at 1178). The court did not quote the portion of *Hawkins* that sets forth what the court found to be "manifestly a legitimate interest," which the court described as a "state's undertaking to secure for its citizens an advantage by offering that advantage to citizens of any other state on condition that the other state make a similar grant." 503 F.2d at 1177. Yet it is precisely that effort to seek an advantage for a state's citizens, by conditioning a grant of a license on reciprocity from other states, that this Court condemned in *A&P* and its progeny.

There is a second respect in which the decision below is inconsistent with decisions of this Court, and that is the conclusion that no constitutional violation has taken place because petitioner can always take the bar exam (App. 9). This argument runs counter to rulings of this Court in the very area of bar admission rules, which make clear the importance of the right to seek admission to the bar and that discrimination with respect to the conditions for bar admission impose harms of constitutional magnitude. Thus, in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), the Court ruled that residence requirements for bar admissions violated the Privileges and Immunities Clause of Article IV, Section 2, in a case in which the plaintiff had passed the bar exam but did not wish to move to New Hampshire, as the law required. The Court rejected all of the justifications offered by the state that the residency rule was necessary to enable a state to assure that applicants meet the "high standards of qualification, such as good moral character or proficiency in its law" which this Court set forth as the legitimate guideposts for bar admission nearly fifty years ago in *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232, 239 (1957). *See also Keenan v. Board of Law Examiners,* 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court) ("In licensing attorneys there is but one constitutionally permissible state objective; the assurance that the applicant is capable and fit to practice law.").

Four years later, another residence requirement case came to this Court in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). This time residence was not a condition for bar membership, but only for obtaining admission without taking the bar exam. The State attempted to distinguish *Piper* on the ground that the

exclusion there was complete, whereas Mrs. Friedman could always take the Virginia bar exam, like everyone else. In finding the requirement to be unconstitutional, this Court said that there need not be a "total exclusion" of an applicant before the Privileges and Immunities Clause applied, and the fact that the plaintiff could take the bar exam was "quite irrelevant" to the constitutional claim before the Court. *Id.* at 65, 66. Despite *Friedman*, the Fourth Circuit here appeared to base its decision in substantial part on this "quite irrelevant" available alternative.

Petitioner recognizes that a number of lower courts, both before and after *Hawkins,* have reached the same conclusion as did the Fourth Circuit here, but in each case involving a reciprocity or other disqualifying provision, the courts based their decisions on the now clearly impermissible ground that the applicant could always take the bar exam. *See, e.g., Schumaker v. Nix*, 965 F.2d 1262, 1270, n.11 (3rd Cir. 1992); *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059 (6th Cir. 1984); *Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983); *Goldsmith v. Pringle*, 399 F. Supp. 620, 625 (D. Colo. 1975) (three-judge court); and *Knowlton v. Board of Law Examiners of Tenn.*, 813 S.W. 2d 788, 792 (Tenn. 1974). The Seventh Circuit was the most clear in explaining this rationale. The rules that had been found unconstitutional in other cases, said the court, "resulted in absolute barriers to bar admission, while the Illinois rule *simply* requires applicants in Lowrie's position to take and pass the Illinois bar examination." *Lowrie,* 716 F. 2d at 412 (emphasis added). The court then noted that, because the applicant was highly qualified, he should have no trouble passing the exam, and he would have been admitted long ago if he had pursued that course. *Id.* at 414-15. *But see Friedman, supra,* 487 U.S. at 68 ("A bar examination, as

we know judicially and from our own experience, is not a casual or lighthearted exercise."). Indeed, in a subsequent bar admission case, but still pre-*Friedman,* the Seventh Circuit recognized that "explicitly reciprocal trade barriers have been knocked down under the commerce clause [citing *A&P* because] they are in effect retaliatory tariffs." *Sistrac v. Clark,* 765 F.2d 655, 661 (1985). In that case, however, the court found no trade barrier, despite the reciprocity provision, because the "bar exam is a condition for admission to the bar imposed on residents and nonresidents alike; the waiving of the condition for a class of new residents *merely* makes it easier for lawyers to change states." *Id.* (emphasis added).

Another significant aspect of these reciprocity cases is the recognition by a number of courts that reciprocity does not serve to protect the public from incompetent or dishonest lawyers, but is designed solely to help local lawyers gain admission on motion elsewhere. Thus, the court in *Goldsmith, supra,* observed that "[a]dmittedly, the government interests which support a state's reciprocity rules have nothing whatsoever to do with the moral character or professional competency of bar applicants" and the "means employed may smack more of coercion than of comity." 399 F. Supp. at 624, 623. Or, as the court put it in *Shenfield v. Prather,* 387 F. Supp. 676, 688-89 (D. Miss. 1972) (three-judge court): "it is true, as plaintiffs argue, that whether a sister state jurisdiction admits Mississippi attorneys by reciprocity has no bearing on the fitness of the individual applicant. . . ." The court nonetheless upheld the rule based on the "salutary purpose of facilitating professional persons in relocating elsewhere," *id.,* precisely the justification rejected in the *A&P* line of cases.

Petitioner recognizes that this Court has not considered the reciprocity issue in the context of bar admission, but between *A&P* and *Friedman* respondents have a decidedly uphill road to overcome. Moreover, the issue is important because there are now 23 states that have some form of reciprocity in bar admission without examination. ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2006CompGuide.pdf (Chart IX, p. 28) (last visited September 28, 2006). The reciprocity issue is directly presented by this case since respondents refused even to consider petitioner's application because he did not satisfy North Carolina's comity rule, despite having practiced law with an unblemished record for almost 25 years at the time that he submitted his application.[2]

B. The "Four of the Last Six Years" Requirement is Wholly Irrational and Cannot Stand Under Heightened Scrutiny or Even Under the Most Relaxed Standard of Review.

Assuming that some reciprocity requirements are constitutional, petitioner argued, and the district court agreed, that the "four of the last six years" requirement in Rule .0502(3) is invalid. The court of appeals apparently reached the opposite conclusion, although the opinion never addressed this claim directly. Petitioner does not contend that all requirements that an applicant have

[2] The district court concluded that petitioner, in effect, lacked standing to challenge the comity rule because he was admitted in two comity states, Indiana and Ohio. App. 14. The conclusion is plainly mistaken because, if the comity requirement were struck down, the "four of the last six years" provision would no longer be a barrier to his admission without examination based on his California bar membership and practice.

practiced law for some number of years immediately preceding his application are unconstitutional because, in general, they would appear designed to assure that a lawyer seeking admission on motion has in fact been engaged in the active practice of law in the recent past, rather than teaching surfing or operating a pizza parlor. The problem with North Carolina's rule, and the reason that petitioner's application was rejected by the BLE, is that the rule requires the active practice for "four of the last six years" in a jurisdiction with comity with North Carolina (or in North Carolina, to the extent that practice by out-of-state bar members is counted under the rule). Because petitioner's active practice since 1985 was in California, which has no comity with any state, his practice did not "count." In petitioner's view, the distinction for purposes of active practice between practice in a comity and in a non-comity state is indefensible and must be set aside.

Respondents have argued that North Carolina's comity rule is subject only to rational basis review because it does not violate any fundamental right, nor is it directed at any suspect class. The court of appeals agreed, apparently assuming that this challenge was only made under the Equal Protection Clause. But petitioner also challenged the rule under the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment, both of which employ heightened standards of review when the discrimination is based, as it is here, on conduct that took place outside the state that is imposing the restriction. *Saenz*, *supra*, 526 U.S. at 504; *Piper, supra,* 470 U.S. at 284 (recognizing practice of law as fundamental right and hence restriction must bear "substantial relationship to

the State's objective" in light of "the availability of less restrictive means").

To be sure, in this case, the discrimination is not against all outsiders, but only those from non-comity states. This Court, however, has been clear that there need not be perfect symmetry in discrimination for these clauses to apply. Thus, in *Saenz, supra,* the persons whose welfare repayments were reduced were all California residents, but the reduction applied only to those who came from states that had lower welfare payments. Despite the fact that the distinction was not between California residents and all others, but between former residents of higher and lower welfare payment states, the Court found the rule invalid under the Fourteenth Amendment Privileges or Immunities Clause. *See also Zobel v. Williams,* 457 U.S. 55 (1982) (greater payments based on greater length of Alaska residence held unconstitutional); *Hooper v. Bernalillo County Assessors,* 472 U.S. 612 (1985) (similar property tax exemption set aside under Equal Protection Clause). Similarly, in *United Build. & Construc. Trades Council v. Mayor and Council of Camden,* 465 U.S. 208 (1984), the preference was for those who resided in the city, which meant that some state residents were also subjected to discrimination, but the Court nonetheless rejected a literal reading of the Privileges and Immunities Clause and found it applicable. *See also Chalker v. Birmingham & N.W. Ry. Co.,* 249 U.S. 522 (1919) (in-state "chief office" requirement practical equivalent of local citizenship requirement and hence subject to Privileges and Immunities Clause challenge); *Hillside Dairy, Inc. v. Lyons,* 539 U.S. 59 (2003) (reaffirming *Chalker* and holding that proxies for citizenship can trigger applicability of Clause). Thus, the court of appeals erroneously analyzed

the "four of the last six years" rule only under the relaxed standard applicable to most equal protection cases.

Moreover, even under equal protection analysis, the court of appeals overlooked the fact that "the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made" applies to laws enacted by democratically elected legislatures or at least rules issued by courts or other full-time government officials. *Kramer v. Union Free School Dist.,* 395 U.S. 621, 627-28 (1969). Rule .0502(3), however, was issued by the BLE, whose members are all members of the North Carolina bar. It was approved by the Council of the North Carolina bar, all but three of whose 58 members are lawyers elected by their fellow lawyers, and it was subject only to limited review by the Chief Justice of North Carolina to determine whether the rule was "inconsistent with this article." And, of course, as in some of the cases in which this Court has found a classification to be suspect, such as *In re Griffiths,* 413 U.S. 717 (1973) (alienage), where the Court noted the political powerlessness of the disadvantaged group, out-of-state attorneys seeking admission to the North Carolina bar under rules issued by the North Carolina lawyers who sit on the BLE have no representation on or influence over the decision-makers, who may, indeed, act out of economically protectionist motives in excluding outsiders. *Cf. Gibson v. Berryhill,* 411 U.S. 564 (1973) (board of practicing optometrists could not, consistent with due process, bring disciplinary proceedings against their competitors). Thus, there is at least a substantial question as to whether it is appropriate in this case to assess the "four of the last six years" rule under the rational basis standard even if

the only basis for challenge were the Equal Protection Clause.

But whatever the standard, this aspect of Rule .0502(3) cannot stand. First, there is *no* evidence of what purpose it serves, either in the rule itself or in the litigation affidavit prepared by the BLE's executive director. That affidavit set forth seven purposes for the admission rule, none having anything to do with the "four of the last six years" aspect. Second, there is no apparent purpose for the rule's insistence that the requirement be met only from a comity state, as opposed to being met by the practice of law generally. Third, the only claimed purpose served by the reciprocity rule itself is to encourage other states to admit North Carolina lawyers without a bar exam, but the "four of the last six years" requirement will actually *discourage* other states from giving favorable treatment to North Carolina lawyers because of a fear that this additional requirement may make comity with North Carolina much less useful than it might appear to be. Fourth, even if states continue to grant reciprocity to North Carolina lawyers, they may reciprocate and require that "four of the last six years" practice be from a comity state, thus making it more difficult for North Carolina lawyers to be admitted on motion elsewhere.

Beginning with *In re Griffiths*, and continuing through *Piper* and *Friedman,* this Court has shown increased skepticism about the proffered justifications for restrictions on admission to state bars and rejected them in each case, albeit under more stringent review than mere rationality. But the Court's skepticism has not been limited to cases involving heightened scrutiny. Thus, in *Frazier v. Heebe,* 482 U.S. 641 (1987), the Court had before it a variety of constitutional challenges to the rule for

admission to the United States District Court for the Eastern District of Louisiana, which had been issued by the district judges themselves. Despite its pedigree, this Court exercised its "supervisory authority to prohibit arbitrary discrimination" and set aside the rule which required a lawyer to have an office or to reside somewhere in the State of Louisiana to be admitted to the Eastern District because the rule was "unnecessary and irrational." *Id.* at 646. Indeed, even under the rational basis test, this Court has not hesitated to draw the line when a "classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Given the lack of any asserted goal for attaching the "four of the last six years" requirement to the comity rule, it is hard to imagine how respondents can defend it, even if the rational basis test applied.

Granting review and considering this aspect of Rule .0502(3) will enable the Court to consider whether proxies for residence must survive some form of heightened scrutiny in the context of bar admission rules governing admission without examination. At the very least, the case will afford the opportunity to remind the lower courts that, even when the most relaxed standards of review apply, they must still address all claims of invidious discrimination and must assure a minimal level of rationality between an asserted goal and the classification at issue.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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October 2006

453 F.3d 190

United States Court of Appeals, Fourth Circuit.
Steven C. **MORRISON**, Esquire, Plaintiff-Appellee,
v.
BOARD OF LAW **EXAMINERS** OF the STATE OF NORTH CAROLINA; Susan Freya Olive; Thomas W. Steed, Jr.; Karl Adkins; Edward J. Harper, II; Gail C. Arneke; Robin L. Tatum; Catherine E. Thompson; William K. Davis; Roy W. Davis, Jr.; Emil F. Kratt; Shirley Fulton; Fred P. Parker, III, and their successors, in their capacities as director and/or members of the Board of Law **Examiners**, Defendants-Appellants.
Association of Corporate Counsel,
Amicus Supporting Appellee.
Steven C. Morrison, Esquire, Plaintiff-Appellant,
v.
Board of Law **Examiners** of the State of North Carolina; Susan Freya Olive; Thomas W. Steed, Jr.; Karl Adkins; Edward J. Harper, II; Gail C. Arneke; Robin L. Tatum; Catherine E. Thompson; William K. Davis; Roy W. Davis, Jr.; Emil F. Kratt; Shirley Fulton; Fred P. Parker, III, and their successors, in their capacities as director and/or members of the Board of Law **Examiners**, Defendants-Appellees.
Association of Corporate Counsel,
Amicus Supporting Appellant.
Nos. 05-1257, 05-1348.

Argued Nov. 29, 2005.
Decided June 15, 2006.

ARGUED: David J. Adinolfi, II, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants/Cross-Appellees. Steven C. Morrison, Holly Springs, North Carolina, for Appellee/Cross-Appellant.

ON BRIEF: Geri S. Krauss, Anthony E. Davis, Hinshaw & Culbertson, L.L.P., New York, New York; Michael L. Shor, Charlotte Chapter of Association of Corporate Counsel, Charlotte, North Carolina; Brian Klemm, Research Triangle Area Chapter of Association of Corporate Counsel, Cary, North Carolina; Susan Hackett, Association of Corporate Counsel, Washington, D.C., for Amicus Supporting Appellee/Cross-Appellant.

Before WIDENER and SHEDD, Circuit Judges, and WALTER D. KELLEY, JR., United States District Judge for the Eastern District of Virginia, sitting by designation. No. 05-1257 reversed; No. 05-1348 dismissed by published opinion. Judge WIDENER wrote the opinion, in which Judge SHEDD and Judge KELLEY concurred.

OPINION

WIDENER, Circuit Judge.

In this 42 U.S.C. § 1983 case, Steven C. Morrison, an attorney, filed suit alleging that the requirements by the Board of Bar Examiners for obtaining comity admission to practice law in North Carolina under its Rule .0502(3) violate the Privileges and Immunities Clause of Article IV, § 2; the Equal Protection Clause of the Fourteenth Amendment; and the Privileges or Immunities Clause of the Fourteenth Amendment. On cross-motions for summary judgment, the district court found that the state prior practice requirement violated Morrison's right to travel under those Constitutional provisions and ordered the North Carolina Board of Law Examiners to admit him. *Morrison v. Board of Law Examiners,* 360 F.Supp.2d 751, 759 (E.D.N.C.2005). Because we are of opinion that the district court erroneously held that North Carolina could

not constitutionally condition its grant of comity on practicing in a State with comity for a given number of years, we reverse.[1]

I.

Morrison graduated with honors from Indiana University School of Law in 1979. He was admitted to practice law in Indiana in 1979, Ohio in 1981, and California in 1985. Until he moved to California in 1984, Morrison maintained law offices in both Indiana and Ohio. He moved to North Carolina in July of 2000 and has lived there since. Morrison submitted a comity application for admission to the North Carolina Bar on December 13, 2003. For six years prior to filing his application, Morrison practiced law in both California and as in-house counsel in North Carolina.

North Carolina Board of Law Examiners Rule .0502 lists the requirements necessary for obtaining a comity admission. Subpart (3) of that rule requires that the applicant,

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[1] Plaintiff's complaint took the position that any grant of comity by North Carolina for one State, but not for another, for licensed attorneys would be invalid. In its opinion, the district court dismissed this claim because it found that plaintiff had suffered no injury from that requirement, obviously referring to Article III injury. A.115. Plaintiff takes exception to that dismissal. Because a dismissal in his cross-appeal for such want of injury is a Constitutional question with jurisdictional consequences, we do not decide that question on appeal but reach the merits of the other question in the case under *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688, Rule 2 (Justice Brandeis concurring) also is applicable.

> [p]rove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law.

N.C.B.L.E. Rule .0502(3).

On January 20, 2004, the Board advised Morrison that his application for a comity admission was denied. The Board denied his application because for four of the six years preceding his application to the Board, Morrison had practiced in a State which did not have comity with North Carolina, namely California.

On February 11, 2004, Morrison filed this suit pursuant to 42 U.S.C. § 1983, alleging that both the requirement that he be admitted to practice in a State having comity with North Carolina, and the requirement that he have practiced for four of the past six years in that State, violate the United States Constitution, particularly the Privileges and Immunities Clause of Article IV, § 2; the Equal Protection Clause of the Fourteenth Amendment; and the Privileges or Immunities Clause of the Fourteenth Amendment.

The district court granted Morrison's motion for summary judgment challenging the Board's requirement that he practice in a specific jurisdiction before obtaining a comity admission. (J.A. 110) The district court also granted the Board's motion for summary judgment as to

Morrison's challenge to the comity requirement. Thus, the district court entered declaratory judgment that the Board's Rule .0502(3) is unconstitutional as applied to Morrison because it requires comity applicants, who are admitted in a comity jurisdiction and have practiced law for four of the immediately preceding six years, to have practiced in a certain jurisdiction. The district court permanently enjoined the Board from enforcing Rule .0502(3) against Morrison. Finally, because Morrison was otherwise qualified pursuant to Rule .0502(3), the district court ordered the Board to extend him a comity admission. This appeal by the Board and cross appeal by Morrison followed.

II.

We review de novo this determination of the validity of the North Carolina regulation involved as we would a district court's determination of the Constitutionality of a state statute. *See McLaughlin v. North Carolina Board of Elections,* 65 F.3d 1215, 1221 (4th Cir.1995).

The Board contends that Rule .0502(3) is constitutional, arguing that Morrison has been treated equally with all North Carolina residents. North Carolina residents do not have an advantage over any other State's applicants for comity admission to the bar. Instead, the Board's rule treats differently persons actively and substantially practicing law in a State having comity from those practicing in a State that does not have comity, which is neither an equal protection violation nor a violation of the privileges and immunities clause, according to the Board. We agree.

As this court stated in *Hawkins v. Moss,*

> The power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy; in fact, it is a power in the exercise of which the state has "a substantial interest."

Hawkins v. Moss, 503 F.2d 1171, 1175 (4th Cir.1974) (citation omitted).[2] Here, Rule .0502(3) requires that the applicant be licensed to practice law in a State having comity with North Carolina and that the applicant has been actively and substantially engaged in the full-time practice of law in that State for at least four of the last six years immediately preceding the application.

Comity requirements have been upheld time and again. In *Hawkins,* a case factually very similar to the present one, a New Jersey attorney established a residence in South Carolina and sought admission to the South Carolina Bar on motion. He challenged the constitutionality of a South Carolina Supreme Court rule which allowed a bar exam exemption to those attorneys admitted to practice in a State granting reciprocity to South Carolina attorneys. The district court found that the rule did not violate the constitutional rights of individuals, such as the plaintiff, licensed by States, such as New Jersey, not granting reciprocity and this court affirmed. *See also*

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[2] *Hawkins* is a case involving the validity of the South Carolina comity Rule 10, which was similar to, but not the same as, the North Carolina rule involved here. For a collection of cases on the subject, we refer to Judge Russell's opinion in *Hawkins.*

Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (1973) (a three-judge district court case).

> We observed in *Hawkins,*
>
> It is a familiar rule of constitutional law that a statute or rule promulgated under state authority will be found to violate equal protection *only* when it results in discrimination against a certain class and the classification is not rationally related to any legitimate state policy or interest.

Hawkins, 503 F.2d at 1177 (citations omitted). "Reciprocal statutes or regulations, it has been uniformly upheld, are designed to meet a legitimate state goal and are related to a legitimate state interest. For this reason, they have been found invulnerable to constitutional attack on equal protection grounds." *Hawkins,* 503 F.2d at 1178. Moreover, the "mere fact that they 'affect some groups of citizens differently than others' or that they 'result in incidental individual inequality' 'will not render such statutes or rules invalid.'" *Hawkins,* 503 F.2d at 1177 (quoting *Martin v. Walton,* 368 U.S. 25, 26, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961)).

Here, Rule .0502(3) requires that applicants be licensed in a State having comity with North Carolina and have practiced for at least four out of the last six years in such a reciprocal State. This requirement affects Morrison because he most recently practiced in California, a non-comity state with North Carolina. However, the negative impact on Morrison does not render the rule invalid. North Carolina is not discriminating against citizens of other States in favor of her own. The rule simply represents North Carolina's "undertaking to secure for its citizens an advantage by offering that advantage to citizens of any

other state on condition that the other state make a similar grant." *Hawkins,* 503 F.2d at 1176-77.

Morrison and the district court insist that Rule .0502(3) includes a residency requirement, which "implicates the Fourteenth Amendment-protected third component of the right to travel" under the privileges and immunities clause of Article IV and the Fourteenth Amendment. First, Rule .0502(3) contains no residency requirement. Just as importantly, *Hawkins* decided the "privileges and immunities" provision of the Fourteenth Amendment provides no "Constitutional base for an attack on the Rule." *Hawkins,* 503 F.2d at 1178. Moreover,

> the right of federal citizenship as reflected in the "right to travel" and as protected by this provision is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice, not a "common occupation", but a profession, which is properly subject to state regulation, in any state to which he travels . . .

Hawkins, 503 F.2d at 1178-79. Also of importance is that, Rule .0502(3) treats Morrison no differently than it treats North Carolina citizens and residents. Rule .0502(3) requires all applicants seeking comity admission to have practiced in the comity state for four of the prior six years. "Thus, whether he be a life-long citizen of [North] Carolina or an individual who, like the plaintiff, has just moved to [North] Carolina, his rights under Rule [.0502] are identical." *Hawkins,* 503 F.2d at 1180. "So long, then, as the State does not subject the migrant attorney, seeking the right to practice in the State, to no more onerous requirements than those imposed on its own citizens seeking such

right, it cannot be said that the State has violated" Article IV, § 2. *Hawkins,* 503 F.2d at 1179-80.

Morrison has been held to no more onerous requirements for admission to the North Carolina bar than any citizen of North Carolina. Simply because he practiced in California, a state not having reciprocity with North Carolina, for four of the last six years, does not mean that his constitutional rights have been violated. He does not meet the requirements of the North Carolina Board of Bar Examiners Rule .0502(3), a valid rule. Thus, he must seek an alternative method of gaining admission, such as taking the bar exam, as do all the other North Carolina lawyers similarly situated. We are of opinion and hold that Rule .0502(3) is valid.

Accordingly, the judgment of the district court in case No. 05-1257 is

REVERSED.

The appeal in case No. 05-1348 is

DISMISSED.

360 F.Supp.2d 751

United States District Court, E.D. North Carolina.
Western Division.
Steven C. MORRISON, Plaintiff,
v.
BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and Susan Freya Olive, Thomas Steed, Jr., Karl Adkins, Edward J. Harper, II, Gail C. Arneke, Robin L. Tatum, Catherine E. Thompson, William K. Davis, Roy W. Davis, Jr., Emil F. Kratt, Shirley L. Fulton and Fred P. Parker III and their successors, in their capacities as director and/or members of the Board of Law Examiners, Defendants.
No. 5:04-CV-92-BO(3).

Feb. 4, 2005.

Steven C. Morrison, Holly Springs, NC, Pro se.

David J. Adinolfi, II, N.C. Dept. of Justice, Raleigh, NC, for Defendants.

ORDER

BOYLE, District Judge.

This matter is before the Court on Plaintiff's and Defendants' Cross Motions for Summary Judgment. The underlying dispute involves Defendants' requirements for attorneys to obtain a comity admission to the North Carolina Bar.

For the reasons discussed below, both Parties' Motions for Summary Judgment are GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiff is an attorney who graduated with honors from Indiana University School of Law in 1979. He is licensed to practice law in Indiana, Ohio, and California. Plaintiff was admitted to practice law in Indiana in 1979. He was admitted to practice in Ohio in 1981. Until his move to California in 1984, Plaintiff maintained law offices in both Indiana and Ohio. He was admitted to practice in California in 1985. Plaintiff relocated to North Carolina in 2000. On December 15, 2003, Plaintiff submitted a comity application for admission to the North Carolina Bar. In the six years immediately preceding his application to Defendants, Plaintiff practiced law in both California and as in-house counsel in North Carolina.

North Carolina Board of Law Examiners Rule .0502 lists the requirements necessary for obtaining a comity admission. Subpart (3) of that rule requires that the applicant "prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law." *See* N.C.B.L.E. Rule .0502(3).

On January 20, 2004, Defendants advised Plaintiff that his application for a comity admission was denied. Upon further inquiry, Plaintiff discovered that his application had been denied because he had not practiced in a state having comity with North Carolina for four of the six

years preceding his application to Defendants. Rather, he had practiced law in California, which does not have comity with North Carolina. On February 11, 2004, Plaintiff filed the instant suit pursuant to 42 U.S.C. § 1983, alleging that both the requirement that he be admitted to practice in a state having comity with North Carolina ("the comity requirement") and the requirement that he have practiced for four of the past six years in that state ("the state-specific practice requirement") violate the United States Constitution, particularly the Article IV, section 2 Privileges and Immunities Clause ("Article IV, section 2") and the Fourteenth Amendment Equal Protection, Privileges or Immunities ("Privileges or Immunities Clause").

ANALYSIS

This case turns on the constitutionality of Defendants' requirement that Plaintiff have practiced in a comity jurisdiction for four of the six years immediately preceding his application. Plaintiff argues the state-specific practice requirement is unconstitutional because it treats certain United States citizens differently based on their prior state of residence. Defendants argue that the state-specific practice requirement is not a residency requirement; that states are historically granted deference in regulating their own bars; and that state bar admission requirements are subject only to rational basis review.

Federal Rule of Civil Procedure 56(c) sets out the standard to be met by a party seeking summary judgment. *See* Fed.R.Civ.P. 56(c). Fed.R.Civ.P. 56(c) provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden to show the court that there is no genuine issue concerning any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to survive the motion, the non-moving party must then show that there is "evidence from which a jury might return a verdict in his favor." *Anderson*, 477 U.S. at 257, 106 S.Ct. 2505. The Court must accept all of the non-moving party's evidence as true and must view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *See id.* at 255, 106 S.Ct. 2505. In this case, the parties stipulate that no issue of fact exists, and the case is ripe for summary judgment.

1. Bar Admissions Jurisprudence in the Fourth Circuit

The question of bar admission requirements is not new to this Circuit. *See Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir.1985) (upholding Virginia's requirement that, in order to obtain an admission by motion to the Virginia Bar, an applicant intend to practice full-time in Virginia); *see Hawkins v. Moss*, 503 F.2d 1171 (4th Cir.1974) (upholding South Carolina's reciprocity requirements against an equal protection challenge brought by an attorney not already admitted to practice in a state having a reciprocity arrangement with South Carolina); *see Keenan v. Board of Law Examiners*, 317 F.Supp. 1350 (E.D.N.C.1970) (striking down North

Carolina's requirement that an applicant for admission to the North Carolina Bar reside for at least one year in North Carolina prior to sitting for the Bar examination). However, the unique facts of Plaintiff's case distinguish it from the cases above and present a novel question to the Court.

2. North Carolina's Comity Requirement

Because Plaintiff is admitted to the state bars of two states having comity with North Carolina, he has no comity barrier to admission in North Carolina. Consequently, he does not risk exclusion from the practice of law by state action in North Carolina because of North Carolina's comity requirement. Plaintiff has suffered no injury in fact from North Carolina's comity requirement and cannot question it in this case. Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's challenge to North Carolina's comity requirement is GRANTED. Plaintiff's challenge to the comity requirement is DISMISSED.

3. The State-specific Practice Requirement

While the states' responsibility for professional licensing is entitled to considerable deference, *see Leis v. Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."), the Supreme Court has invalidated certain states' bar admission requirements on constitutional grounds. *See, e.g., Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56

(1988) (striking down the Virginia State Bar's residency requirement as a prerequisite to Virginia's equivalent of a comity admission on Article IV, section 2 grounds); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (striking down the New Hampshire State Bar's residency requirement as a prerequisite to admission to the New Hampshire Bar on Article IV, section 2 grounds); *see also Barnard v. Thorstenn,* 489 U.S. 546, 109 S.Ct. 1294, 103 L.Ed.2d 559 (1989) (striking down on Article IV, section 2 grounds the Virgin Islands' requirement that an applicant to the Virgin Islands Bar have resided in the Virgin Islands for a year prior to his or her application for admission and, if admitted, he or she intend to reside and practice in the Virgin Islands). In those cases, the practice of law was firmly recognized as a "privilege" under Article IV, section 2. *Piper,* 470 U.S. at 281, 105 S.Ct. 1272; *Friedman,* 487 U.S. at 66, 108 S.Ct. 2260.

In this case, Plaintiff, a citizen of North Carolina, seeks a comity admission to the North Carolina Bar. He has been denied the opportunity to practice law in North Carolina and that denial infringes on a privilege protected by Article IV, section 2.[1] Unlike *Piper, Friedman*, and *Barnard,* the unique fact of this case is that Plaintiff has

[1] It is important to note that the *Friedman* Court specifically rejected Virginia's contention that the fact that the applicant for admission by motion was always free to sit for the Virginia Bar examination meant that the applicant was not being discriminated against on the basis of citizenship. Here, Defendants contend that Plaintiff has always been free to sit for the North Carolina Bar like any other applicant and thus is not being discriminated against on the basis of prior residency. The *Friedman* Court specifically rejected this argument and so does this Court. *See Friedman,* 487 U.S. at 66-67, 108 S.Ct. 2260.

already relocated to North Carolina, and, thus, a reading of Article IV, section 2 under *Slaughter-House* affords him no protection. *See Goldfarb,* 766 F.2d at 864-65 ("Goldfarb may not rely directly on [*Piper* and its progeny] because [Goldfarb] is a Virginia resident, and [Article IV, section 2] provides no security for the citizen of the State in which the privileges were claimed.") (quoting *Slaughter-House,* 83 U.S. at 77, 83 U.S. 36) (internal quotations omitted). Applying *Goldfarb* produces the result that Plaintiff, a North Carolinian by virtue of current residence, cannot assert his *Piper*-recognized fundamental right to pursue his profession under Article IV, section 2, which he could assert had he applied for a comity admission while in California.

In more typical challenges to bar admission requirements, plaintiffs have relied on the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Hawkins v. Moss,* 503 F.2d 1171 (4th Cir.1974); *Brown v. Supreme Court of Virginia,* 359 F.Supp. 549 (E.D.Va.1973) (rejecting an equal protection challenge to Virginia's requirement that an attorney seeking admission to the Virginia Bar without examination express an intent to reside and practice in Virginia). However, few courts, if any, did not apply rational basis review, and, as such, equal protection challenges to bar admission standards, other than residency requirements, have been uniformly upheld. In this case, Plaintiff relies on several components of the Fourteenth Amendment to challenge Rule .0502(3). For the reasons discussed below, the Court will only address the most novel of Plaintiff's claims.

Recent Supreme Court precedent allows Plaintiff to pursue this action under the Fourteenth Amendment's Privileges or Immunities Clause.[2] In 1999, the Supreme Court relied on the "right to travel" to invalidate a California law that calculated the amount of welfare benefits available to a newly-arrived California resident based on the amount of benefits available to that individual in his previous state of residence. *See Saenz v. Roe,* 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).[3]

In 1992, the California Legislature enacted § 11450.03 of the state Welfare and Institutions Code. That section limited for new residents the amount of California Aid to Families with Dependent Children ("AFDC") available to the amount the new residents would have received in the State of their prior residence. *Saenz,* 526 U.S. at 493, 119 S.Ct. 1518. In 1997, two plaintiffs from Oklahoma and Washington, D.C., respectively, filed suit challenging the constitutionality of the statute.

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[2] The *Saenz* Court held that standing to challenge state action under the Fourteenth Amendment Privileges or Immunities Clause derived from both state and United States citizenship. *Saenz,* 526 U.S. at 502, 119 S.Ct. 1518. Accordingly, Plaintiff could have brought his "right to travel" challenge prior to his move to North Carolina.

[3] The *Saenz* Court recognized the "right to travel" as having three components. "[The "right to travel"] protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz,* 526 U.S. at 500, 119 S.Ct. 1518. The Court held that the first component pre-dated the Constitution; the second was enshrined in Article IV, section 2; and the third was protected by the Privileges or Immunities Clause of the Fourteenth Amendment. *Saenz,* 526 U.S. at 501-03, 119 S.Ct. 1518.

Both plaintiffs arrived from states that had benefit levels that were substantially lower than those of California. *Saenz,* 526 U.S. at 496, 119 S.Ct. 1518. The statute created two groups of welfare beneficiaries among those who had not resided in California for at least one year: 1) those favored beneficiaries who moved to California from states having welfare benefit levels equaling or exceeding those of California and 2) those disfavored beneficiaries who arrived from states with benefit levels lower than those of California. The distinction between the two groups of beneficiaries turned solely on the location of the beneficiaries' prior states of residence. *Saenz,* 526 U.S. at 505, 119 S.Ct. 1518.

The statute discriminated "against citizens who ha[d] completed their interstate travel," and, therefore, implicated the plaintiffs' Fourteenth Amendment right, the third component of the "right to travel," to "be treated equally in [their] new State of residence." *Saenz,* 526 U.S. at 504-05, 119 S.Ct. 1518. Not recognizing a "fundamental right" to welfare benefits but instead a right to receive equal treatment in the new state, the Court held that California's statutory scheme violated the right to travel "unless shown to be necessary to promote a compelling governmental interest." *Saenz,* 526 U.S. at 504, 119 S.Ct. 1518 (citing 526 U.S. at 499, 119 S.Ct. 1518).

California "advanced an entirely fiscal justification for its multi-tiered scheme," arguing that the law would save California approximately $10.9 million a year. *Saenz,* 526 U.S. at 506, 119 S.Ct. 1518.[4] While not questioning the

[4] The *Saenz* Court pointed out that both the District and Appellate Courts found the law's unstated purpose to be discouragement of indigent immigration into California. There is no allegation in this case

(Continued on following page)

legitimacy of the state's interest, the Court held that the means of saving money chosen by the state were unconstitutional because neither the "duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among [California's] needy citizens." *Saenz*, 526 U.S. at 507, 119 S.Ct. 1518. The statute violated the Fourteenth Amendment because it was not narrowly tailored to serve California's interest and, therefore, unnecessarily infringed on the third component of the right to travel.

Here, Defendants base their determination of an applicant's suitability for a comity admission in part on the state in which an applicant last practiced law. The rule requires that applicant "prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law." N.C.B.L.E. Rule .0502(3).

Defendants' require an applicant to have "been physically practicing in [the comity] jurisdiction." *See*

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that Defendants hope to discourage immigration to North Carolina by lawyers from states not having comity with North Carolina. Instead, Defendants argue that the rule encourages other states to open their jurisdictions to North Carolina lawyers.

"Reciprocity Requirements for Admission to Practice Law in North Carolina," *available at* http://www.ncble.org. Even though the text of the Rule considers location of prior practice and not residence, the Rule in fact considers Plaintiff's prior residence because Plaintiff both lived and worked in California.

However logical it is to equate residency with place of practice, evidence proving as much is unavailable to the Court. In the legal profession and the workforce in general, crossing a state line to get to work would appear to be the exception more often than the rule. Of course, border residents and those Americans who live in major metropolitan areas, e.g., greater New York City, might cross state lines daily as a matter of course. Nonetheless, statistics supporting the proposition are elusive.[5] In Plaintiff's case, however, like the statute at issue in *Saenz,* the state-specific practice requirement treats him differently based on his immediately prior state of residence.

By its terms, Defendants' Rule .0502(3) sets out three requirements for an applicant seeking admission by comity: 1) a license to practice law in a comity jurisdiction; 2) having practiced law for four of the past six years immediately preceding the application for admission by

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[5] Of the several state bars contacted by the Court, none have statistics comparing residency to location of practice. Rather, the state bars compile statistics indicating whether an attorney who is licensed in a particular state lives in that state. As an example, a resident of Atlanta is licensed to practice law in North Carolina and Georgia, with his primary practice occurring in the state of Georgia. He would be counted by the North Carolina Bar as an out-of-state member of the North Carolina Bar. That fact indicates nothing about whether he lives in greater Atlanta or commutes from Chattanooga daily.

comity; and 3) having done so in the jurisdiction from which the applicant seeks a comity admission.[6] Rule .0502(5) further requires that the applicant be in good standing in every jurisdiction in which he is admitted to practice.

Therefore, among all the lawyers seeking comity admissions, the favored group consists of those lawyers admitted in a jurisdiction having comity with North Carolina who have practiced in that jurisdiction for four of the past six years and are in good standing in every jurisdiction in which they are admitted to practice. The disfavored group consists of those lawyers not admitted in a comity jurisdiction; those lawyers admitted in a comity jurisdiction who have not been practicing law for four of the past six years; those lawyers admitted in a comity jurisdiction who have been practicing law for four of the past six years but are not in good standing with every jurisdiction in which they are admitted; and those lawyers admitted in a comity jurisdiction who have been practicing law for four of the past six years and are in good standing with every jurisdiction in which they are admitted but have not been practicing in a comity jurisdiction. Only the last group's identity is based solely on the location of its members' prior residence and practice location. Plaintiff is a member of this group.

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[6] Plaintiff characterizes Rule .0502(3) has having only two components: the comity requirement and the state-specific practice requirement. *See supra* p. 752-53. To avoid constitutional concerns over federalism, the Court construes the Rule as having three severable components. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n. 15, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (recognizing the doctrines of avoidance of constitutional questions and federalism concerns).

Rule .0502(3)'s operation against that group implicates the Fourteenth Amendment-protected third component of the right to travel, as discussed by the Court in *Saenz:* the rule treats an applicant differently based on his prior state of residence. *See Saenz,* 526 U.S. at 502, 119 S.Ct. 1518 ("What is at issue in this case, then, is this third aspect of the right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."). If Plaintiff had moved directly from Indiana to North Carolina, he would have been granted a comity admission. However, as mentioned above, since he moved from California to North Carolina, he is being denied a comity admission. Accordingly, Defendants must justify both the requirement's purpose and means. *Saenz,* 526 U.S. at 504-05, 119 S.Ct. 1518. Absent a sufficient justification, the rule is unconstitutional.

Like the California Legislature in *Saenz,* Defendants have a legitimate and important purpose in seeking to ensure only the most competent attorneys are admitted to practice in North Carolina. *See Hawkins v. Moss,* 503 F.2d 1171, 1175 (4th Cir.1974) (recognizing a state's bar's substantial interest in ensuring an applicant's legal competency or proficiency); *see also* N.C.G.S. § 84-24 ("The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law."). In an affidavit, Defendant Fred P. Parker III has asserted that the purpose of Rule .0502 is to, *inter alia,* "insure that comity applicants are admitted from jurisdictions which

demand high standards similar to those the State of North Carolina demands of applicants." Def.'s Aff. 2.[7] Like the Court in *Saenz,* this Court accepts as legitimate Defendants' stated purposes.

However, like the statute challenged in *Saenz,* the requirement that the applicant have practiced in a specific jurisdiction before coming to North Carolina is not narrowly tailored to serve North Carolina's interests. *See Saenz,* 526 U.S. at 507, 119 S.Ct. 1518. Defendants' purpose is served by the comity requirement alone. Admission in a state having comity with North Carolina indicates an applicant's competence as a lawyer. Here, Plaintiff has been admitted in both Indiana and Ohio since 1981. Both jurisdictions meet North Carolina's standards for comity recognition.

Defendants' purpose is further served by the requirement that an applicant have "actively and substantially engaged in the full-time practice of law" for four of the six years immediately preceding his application. N.C.B.L.E. Rule .0502(3). This requirement ensures that an applicant cannot immediately gain admission to practice in North Carolina once he obtains admission to a comity jurisdiction. Rather, the rule requires that he practice in another jurisdiction for a sufficient period of time to ensure his professional competence. Here, Plaintiff has practiced law

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[7] Assuming without deciding that using comity admissions as a means to encourage other states to grant comity admissions to North Carolina lawyers is an acceptable purpose, *see* Def.'s Aff. 2, that purpose is served by Rule .0502(4) alone. N.C.B.L.E. Rule .0502(4) (requiring that an applicant for a comity admission satisfy Defendants that the jurisdiction from which he seeks admission admits North Carolina lawyers without examination).

for nearly twenty-five years. He has taught courses for the California Bar and has unique experiences practicing law in Indiana, Ohio, California, and North Carolina. There is little danger that, if granted a comity admission, he will fail to meet Defendants' standards.

Rule .0502(5) further serves Defendants' purposes by requiring that an applicant for comity "[b]e at all times in good professional standing and entitled to practice in every state . . . in which the applicant has been licensed to practice." Plaintiff is in good standing with the state bars of California, Indiana, and Ohio.

The only remaining aspect of the rule is its emphasis on the state in which an applicant practiced for four of the six years immediately preceding his application. This component of Rule .0502(3) does not serve Defendants' purposes. There is no jurisdiction in the United States that has a particularly deficient legal bar. Thus, there is little chance that a lawyer's experience practicing in a non-comity jurisdiction could adversely affect his professional competence. Here, Plaintiff has spent the last six years practicing in both North Carolina and California. Neither jurisdiction's legal bar is so deficient as to raise questions about Plaintiff's competence as an attorney.

Because Rule .0502(3)'s state-specific practice requirement treats Plaintiff differently on the basis of the state in which he used to live and practice, the Fourteenth Amendment right to travel is implicated. Where state action implicates the right to travel, to survive a constitutional challenge, a state must justify the action's purpose and means by showing that it is necessary to serve a compelling state interest. If that justification is insufficient, the state action is unconstitutional.

In this case, Defendants' rule treats Plaintiff differently based on whether he used to practice in certain states, thereby implicating the Fourteenth Amendment. Defendants' justification for the rule fails because their purposes are effectively served without applying the state-specific practice requirement. Since the justification fails, Rule .0502(3)'s state-specific practice requirement is unconstitutional. Accordingly, Plaintiff's Motion for Summary Judgment on his Privileges or Immunities Clause claim is GRANTED.[8]

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is GRANTED as to his challenge to Defendants' requirement that he practice in a specific jurisdiction before obtaining a comity admission. Defendants' Motion for Summary Judgment is GRANTED as to Plaintiff's challenge to Defendants' comity requirement. Plaintiff's challenge to Defendants' comity requirement is DISMISSED.

The Court hereby enters a DECLARATORY JUDGMENT that Defendants' Rule .0502(3) is UNCONSTITUTIONAL as applied to Plaintiff so far as it requires comity applicants who are admitted to a comity jurisdiction and

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[8] It is important to note what Plaintiff's success today does not do. Defendants are not required to create comity arrangements with any jurisdiction in the country, and Defendants are free to impose practice requirements of any length of time on would-be comity applicants. Further, Defendants could abolish comity admissions in their entirety and require all applicants for admission to the North Carolina Bar to sit for the Bar Examination. Today's ruling holds only that Defendants cannot Constitutionally confer comity admissions based in part on the location of an applicant's prior state of practice and residence.

have practiced law for four of the past six years to have practiced in a certain jurisdiction during that time period. Defendants are PERMANENTLY ENJOINED from enforcing Rule .0502(3) against PLAINTIFF. Because Plaintiff is otherwise qualified pursuant to Rule .0502, Defendants are ORDERED to extend him a comity admission.

SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 12, 2006

No. 05-1257
CA-04-92-5-BO

STEVEN C. MORRISON, Esquire

Plaintiff-Appellee

v.

BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA; SUSAN FREYA OLIVE; THOMAS W. STEED, JR.; KARL ADKINS; EDWARD J. HARPER, II; GAIL C. ARNEKE; ROBIN L. TATUM; CATHERINE E. THOMPSON; WILLIAM K. DAVIS; ROY W. DAVIS, JR.; EMIL F. KRATT; SHIRLEY FULTON; FRED P. PARKER, III, and their successors, in their capacities as director and/or members of the Board of Law Examiners

Defendants-Appellants

ASSOCIATION OF CORPORATE COUNSEL

Amicus Supporting Appellee

No. 05-1348
CA-04-92-5-BO

STEVEN C. MORRISON, Esquire

Plaintiff-Appellant

v.

BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA; SUSAN FREYA OLIVE; THOMAS W. STEED, JR.; KARL ADKINS; EDWARD J. HARPER, II; GAIL C. ARNEKE; ROBIN L. TATUM; CATHERINE E. THOMPSON; WILLIAM K. DAVIS; ROY W. DAVIS,

JR.; EMIL F. KRATT; SHIRLEY FULTON; FRED P. PARKER, III, and their successors, in their capacities as director and/or members of the Board of Law Examiners

Defendants-Appellees

ASSOCIATION OF CORPORATE COUNSEL

Amicus Supporting Appellant

On Petition for Rehearing En Banc

Appellee/cross-appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Shedd, and Judge Kelley.

For the Court,

/s/ Patricia S. Connor
CLERK

NORTH CAROLINA BOARD OF LAW EXAMINERS

RULE .0502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the code of Professional Responsibility as Promulgated by the North Carolina State Bar.

(b) That the applicant furnishes the following documentation:

i. Certificates of Moral Character from four (4) individuals who know the applicant;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;

vii. A certificate of admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $1,500.00, no part of which may be refunded to the applicant whose application is denied;

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which the applicant is duly licensed; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this state which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(4) Satisfy the Board that the state, or territory of the United States, or the District of Columbia, in which the applicant is licensed, and from which he seeks comity, will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District

of Columbia, without written examination, other than the Multistate Professional Responsibility Examination;

(5) Be at all times in good professional standing and entitled to practice in every state, territory of the United States, or the District of Columbia, in which the applicant has been licensed to practice law, and not under pending charges of misconduct while the application is pending before the Board; except that the applicant may be inactive in any jurisdiction as to which the applicant is not relying to meet the Board's comity rule;

(6) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(7) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971

(8) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application;

(9) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

North Carolina General Statute

§ 84-24. Admission to practice.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the Council, who need not be members of the Council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years.

The Board of Law Examiners shall elect a member of the Board as chair thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable the Board to perform its duties promptly and properly. The chair and any employees shall serve for a period of time determined by the Board.

The examination shall be held in the manner and at the times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide assistance as

may be required to enable it to perform its duties promptly and properly. Records, papers, and other documents containing information collected and compiled by the Board or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records within the meaning of Chapter 132 of the General Statutes.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Department of Justice may provide a criminal record check to the Board of Law Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall

not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this section.

The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.

All rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the Council.

Whenever the Council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to the person, noting thereon that the license is issued in compliance with an order of the Council, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance. Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, § 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, § 6; 1947, c. 77; 1951, c. 991, § 1; 1953, c. 1012; 1965, cc. 65, 725; 1973,

c. 13; 1977, c. 841, § 2; 1983, c. 177; 1991, c. 210, § 4; 1995, c. 431, § 17; 2002, c. 147, § 5.)

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§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to in this Chapter as the "Council", which shall be composed of 55 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president. Notwithstanding any other provisions of the law, the North Carolina State Bar may acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 55. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years based on the number of active members of each judicial district bar according to the records of the North Carolina State Bar

and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the Council until expiration of the remainder of the current term. A councilor whose judicial district is altered by the General Assembly during the councilor's term shall continue to serve on the Council until the expiration of the term and shall represent the district wherein the councilor resides or with which the councilor has elected to be affiliated. If before the alteration of the judicial district of the councilor the judicial district included both the place of residence and the place of practice of the councilor, and if after the alteration of the judicial district the councilor's place of residence and place of practice are located in different districts, the councilor must, not later than 10 days from the effective date of the alteration of the district, notify the Secretary of the North Carolina State Bar of an election to affiliate with and represent either the councilor's district of residence or district of practice. In addition to the 55 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. The public members may vote and participate in all matters before the Council to the same extent as councilors elected or appointed from the various judicial districts. (1933, c. 210, § 3; 1937, c. 51, § 1; 1955, c. 651, § 1; 1961, c. 641; 1973, c. 1152, § 2; 1977, c. 841, § 2; 1979, c. 570, §§ 1, 2; 1981, c. 788, § 3; 1985, c. 60, § 1; 1987, c. 316, § 1; 1995, c. 431, § 9.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:04-CV-92-BO(3)

STEVEN C. MORRISON, *an individual* Plaintiff, v. BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and SUSAN FREYA OLIVE, THOMAS STEED, JR., KARL ADKINS, EDWARD J. HARPER, II, GAIL J. ARNEKE, ROBIN L. TATUM, CATHERINE L. THOMPSON, WILLIAM K. DAVIS, ROY W. DAVIS, JR., EMIL F. KRATT, SHIRLEY L. FULTON and FRED P. PARKER III and their successors, *in their capacities as director and/or members of the Board of Law Examiners* Defendants.	AFFIDAVIT OF FRED P. PARKER III DIRECTOR OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

I, Fred P. Parker III, being first duly sworn, depose and say:

1. I am a citizen and resident of the State of North Carolina and over eighteen years of age.

2. I am currently employed by the State of North Carolina as the Executive Director of the Board of Law Examiners of the State of North Carolina.

3. The Board of Law Examiners has full power and authority under N.C.G.S. §84-24 to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy the Board that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor at law. This legislative mandate includes the power to make, alter and amend such rules and regulations for the admission to the Bar as in the Board's judgment shall promote the welfare of the State and the legal profession.

4. Comity Rule .0502 was adopted to:

   (a) regulate admissions;

   (b) protect the public and assure a competent Bar;

   (c) insure that comity applicants are admitted from jurisdictions which demand high standards similar to those the State of North Carolina demands of applicants;

   (d) help evaluate the character and fitness of comity applicants;

   (e) aid the Board's investigatory function concerning applicants;

   (f) facilitate interstate travel by allowing applicants from reciprocal states to become admitted to the North Carolina Bar without the necessity of taking the Bar examination;

   (g) facilitate interstate travel by encouraging other states to admit North Carolina attorneys without taking a Bar examination.

5. Mr. Morrison has requested to be admitted as an exception to Rule .0502 based upon several facts. The exception to Rule .0502 Mr. Morrison has requested has not been granted for anyone.

6. The State Board has not subjected Mr. Morrison to more onerous requirements for admission than those imposed upon other North Carolina citizens or comity applicants.

7. Mr. Morrison appears to have been, at all times pertinent to this matter, educationally eligible to sit for the North Carolina Bar examination

8. The Board did not accept Mr. Morrison's comity application because he did not meet the requirements in Rule .0502, a fact which he admits when he states he "has continued to be a member of the California State Bar" since 1985. California does not grant comity admission to North Carolina attorneys.

9. Mr. Morrison did not physically practice law for four of the last six years in a state which grants admission without examination to attorneys licensed in North Carolina.

10. For that reason, Mr. Morrison's comity application was not accepted and he was notified by letter dated January 20, 2004.

Further your affiant sayeth not,

This the 10th day of March, 2004.

/s/ Fred P. Parker III
Fred P. Parker III
Executive Director
Board of Law Examiners of
the State of North Carolina

NORTH CAROLINA
COUNTY OF WAKE

Sworn to and subscribed before me
this the 10th day of March, 2004.

/s/ Janice I. Davies
Notary Public
My Commission Expires: 6/25/05

[Seal]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

Case No.: 5:04-CV-92-BO(3)

STEVEN C. MORRISON, *an individual* Plaintiff, vs. BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, *and* SUSAN FREYA OLIVE, THOMAS W. STEED, JR., KARL ADKINS, EDWARD J. HARPER, II, GAIL C. ARNEKE, ROBIN L. TATUM, CATHERINE E. THOMPSON, WILLIAM K. DAVIS, ROY W. DAVIS, JR., EMIL F. KRATT, SHIRLEY L. FULTON and FRED P. PARKER III and their successors, *in their capacities as director and/or members of the Board of Law Examiners* Defendants.	AFFIDAVIT OF STEVEN C. MORRISON (Filed Mar. 23, 2004)

I, Steven C. Morrison, solemnly swear, affirm, and declare that:

1. I am a citizen of the United States residing in North Carolina and over eighteen (18) years old.

2. I am a 50-year-old attorney who graduated with honors from Indiana University School of Law in 1979. I am educationally qualified to be admitted to the bar. (Note: the Board also agrees, see Affidavit of Parker ¶ 7)

3. I clerked for a federal magistrate in the Southern District of Indiana federal court (Hon Thomas Faulconer).

4. I am licensed, by exam, in three states: Indiana, Ohio, and California. Indiana and Ohio are comity states accepted by North Carolina. (Note: the Board agrees that I am admitted in these three states. See Memorandum in Support of Defendants' Motion to Dismiss p.2.)

5. I have been given an "AV" rating from Martindale Hubbell, after they interviewed judges, attorneys, opposing counsel, and the state bar about my ethical and professional performance. An "AV" rating is the highest distinction in legal work and ethics.

6. I have presented four different continuing legal education seminars certified by the bar of California. I have volunteered my legal services *pro bono* for those who could not pay for any attorney yet were disadvantaged by their legal situation. I have helped legal Hispanic Americans fight to keep their kids in classes that were taught in English when "educators" wanted to teach them in Spanish only because of their surnames. I also serve as a board member for my church. I coordinate a high school and college teen group that meets about twice a month. I have been a youth coach, umpire, commissioner and president of a youth league. I have served on civic committees to plan parks and recreational development.

7. I have never been charged or convicted of anything other than a traffic ticket.

8. I was formerly the Chief Legal Officer of TogetherSoft Corporation, a company I started for a client in 1999 and grew extremely quickly to include 400 employees worldwide with 100 here in Raleigh. I was also a board member, and legal representative for our subsidiaries in England, Germany, Czech Republic, Russia, Japan and other subsidiaries. Borland Software, a publicly traded corporation, recently purchased the company for $205 million. As is normal in such a situation, the administrative officers such as myself, were not retained.

9. In the late summer or fall of 2003 (I did not keep a record of the date, but I fully recall the conversation) I called Defendant Fred Parker to ask him if the Board would consider my comity application under my particular circumstances. Fred Parker told me that the Board would never consider the application since it would be rejected it because I was admitted to California and the rules did not allow comity application to attorneys admitted in California.

10. I filed my application for comity admission with the defendant Board of Law Examiners on December 15, 2003. The application, in addition to all the standard information, also had an extensive brief outlining how I could qualify for comity admission under a liberal interpretation (which I have not set before this court) or that in the alternative, why the rules were unconstitutional as applied to me. The intake employee took the application in the other room and within 2 or 3 minutes returned the application to me stating that I did not qualify. I asked why, and she said

that the application indicated that I had had an office in California at some point in the last six years and that therefore I did not qualify. I then prevailed upon her to take the application so that at least I could get a formal notification of the rejection. The Plaintiff offers to submit the application under seal to the court if desired. It needs to be under seal because it contains my social security number, bank accounts, and other sensitive information.

11. The application was returned to me after January 20, 2004 because the Board of Law Examiners decided that I was not eligible for comity admission. The Board has indicated that it was returned because California is not a comity state, and because I practiced in California for part of the last six years instead of in a comity state. See Affidavit of Parker ¶¶ 8-9.

12. I am an expert in certain aspects of software contracting and licensing (both nationally and internationally). It is my experience that all software development contracts or licenses between a North Carolina company and a large company located elsewhere in the US or internationally will have a choice of law provision which will use California or possibly New York law, but will never use North Carolina law. Because of my expertise, I have been contacted on at least two occasions to advise North Carolina companies on such matters because they could not find similar expertise and I have had to decline because I am not admitted in the State of North Carolina

Further the affiant saveth not.

Sworn and subscribed to, under the United States laws for the penalty for perjury this 23 day of March, 2004

/s/ Steven C. Morrison
Steven C. Morrison

(Web page taken from www.ncble.org/ "comity" as of 9/25/06)

RECIPROCITY REQUIREMENTS FOR ADMISSION TO THE PRACTICE OF LAW IN NORTH CAROLINA

1) Must have graduated from an ABA Accredited Law School.

2) In order to be eligible for admission by comity you must be able to substantiate that you have been engaged in the *full-time practice of law* as your principal means of livelihood and duly licensed in a reciprocal jurisdiction for at least four out of the last six years; *a minimal 48 months*. You must be or have been *physically practicing in this jurisdiction*. You may be required to submit supporting documentation, including time-sheets. In the event you cannot meet this requirement you are not eligible for comity admission.

3) Reciprocal jurisdictions as of April 19, 2005:

ALASKA	NEW HAMPSHIRE
ARKANSAS	NEW YORK
COLORADO	NORTH DAKOTA
CONNECTICUT	OHIO
DISTRICT OF COLUMBIA	OKLAHOMA
GEORGIA	PENNSYLVANIA
ILLINOIS	
INDIANA	TENNESSEE
IOWA	TEXAS
KANSAS	UTAH
KENTUCKY	VERMONT

MASSACHUSETTS	WASHINGTON
MICHIGAN	WEST VIRGINIA
MINNESOTA	WISCONSIN
MISSOURI	WYOMING
NEBRASKA	

COMITY APPLICATION

No. 06-499

In the

Supreme Court of the United States

STEVEN C. MORRISON,

Petitioner,

v.

BOARD OF LAW EXAMINERS OF NORTH CAROLINA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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December 13, 2006

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QUESTION PRESENTED

Whether North Carolina may constitutionally restrict admission to the practice of law to applicants who either (1) pass North Carolina's bar examination or (2) have been licensed and have actively practiced for four of the last six years in a State having comity with North Carolina.

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In the

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No. 06-499

STEVEN C. MORRISON,

Petitioner,

v.

BOARD OF LAW EXAMINERS OF NORTH CAROLINA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 453 F.3d 190. The order denying rehearing is unreported (Pet. App. 27-28). The opinion of the district court (Pet. App. 10-26) is reported at 360 F. Supp. 2d 751.

JURISDICTION

The court of appeals entered its judgment on June 15, 2006 (Pet. App. 1-9) and rehearing was denied on July 12, 2006 (Pet. App. 27-28). The petition for certiorari was filed on October 5, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

North Carolina General Statutes Section 84-24 provides that the North Carolina Board of Law Examiners "shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law." The principal means for admission to the bar is for an applicant to sit for the North Carolina Bar Examination. Pursuant to rules adopted by the Board, an applicant who is an attorney admitted to practice in another State may, in the discretion of the board, be licensed to practice without taking the North Carolina Bar Examination if:

> the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law.

Rule .0502(3) (Pet. App. 30). Petitioner brought the present action in the United States District Court for the Eastern District of North Carolina, contending that Rule .0502 violates

"the United States Constitution, Article IV, section 2 Privileges and Immunities Clause and the Fourteenth Amendment Equal Protection, Privileges and Immunities, and Right to Interstate Travel Clauses." (Complaint ¶¶ 28 & 33) Prior to filing his petition for certiorari, Petitioner has never contended that this Rule violates the Commerce Clause.

Petitioner graduated with honors from Indiana University School of Law in 1979. He was admitted to practice law in Indiana in 1979, Ohio in 1981, and California in 1985. In 1984, Petitioner moved to California. Petitioner moved to North Carolina in July 2000 and has been a resident of North Carolina since that date. On December 13, 2003, Petitioner filed an application with the Board of Law Examiners for admission by comity to the North Carolina bar. For the six years immediately prior to this application, Petitioner had practiced law in California and as an in-house counsel in North Carolina.

On January 20, 2004, the Board advised Petitioner that his application for admission by comity had not been accepted for consideration by the Board because he did not meet the requirements of Rule .0502. Specifically, the Board noted that Petitioner had not practiced law for four of the last six years in a State which grants admission without examination to attorneys licensed in North Carolina. On February 11, 2004, Petitioner filed the present action.

The district court granted summary judgment in favor of North Carolina with respect to Petitioner's constitutional attack on the comity requirement of Rule .0502(3) (i.e., the provision that allows a bar applicant to dispense with taking the bar if the applicant is a member of the bar of a State that grants comity to North Carolina). The district court concluded that

because Petitioner was a member of the bar of two States that have comity with North Carolina, Petitioner had suffered no injury as a result of North Carolina's comity requirement. (Pet. App. 14)

The district court, however, concluded that the provision of Rule .0502(3) that requires an applicant who is seeking comity admission to have practiced law for four of the last six years in a comity State ("the practice requirement") is unconstitutional. In analyzing the practice requirement, the district court recognized that Petitioner is a citizen of North Carolina and that the Privileges and Immunities Clause of Article IV, section 2 "affords him no protection" under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). (Pet. App. 16) The district court concluded that "Plaintiff, a North Carolinian by virtue of current residence, cannot assert [a claim] under Article IV, section 2." (Pet. App. 16) Given that Petitioner could not pursue a claim under Article IV, section 2, the district court proceeded to turn to Petitioner's other "novel" constitutional claims. (Pet. App. 16)

The district court concluded that *Saenz v. Roe,* 526 U.S. 489 (1999) recognized a "right to travel" and that, under the Fourteenth Amendment's Privileges or Immunities Clause, this right to travel cannot be impeded by treating persons differently based upon his or her prior residency. (Pet. App. 19) The district court recognized that "the text of [Rule .0502(3)] considers location of prior practice and not residence." (Pet. App. 20) Nevertheless, the district court judge, after he contacted several State bars and was unable to obtain any statistics to support his theory, concluded that it was "logical . . . to equate residency with place of practice." (Pet. App. 20) The district court proceeded to enter a declaratory

judgment that Rule .0502(3) violates Petitioner's right to travel and ordered the Board to extend to Petitioner admission to the North Carolina bar.[1] (Pet. App. 10-26)

A unanimous panel of the court of appeals reversed the district court. The panel rejected Petitioner's arguments that Rule .0502(3) violates the Privileges and Immunities Clause or the Equal Protection Clause:

> The Board contends that Rule .0502(3) is constitutional, arguing that Morrison has been treated equally with all North Carolina residents. North Carolina residents do not have an advantage over any other State's applicants for comity admission to the bar. Instead, the Board's rule treats differently persons actively and substantially practicing law in a State having comity from those practicing in a State that does not have comity, which is neither an equal protection violation nor a violation of the privileges and immunities clause, according to the Board. We agree.

(Pet. App. 5) The court of appeals concluded that, despite Petitioner's argument to the contrary, Rule .0502(3) does not contain a residency requirement. (Pet. App. 8) Accordingly, the rule treats Petitioner no differently than it treats North

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[1] The district court ordered that Petitioner be admitted to the North Carolina bar even though the requisite character and background checks had not yet been conducted by the Board. The district court subsequently stayed its order pending appeal.

Carolina citizens and residents. (Pet. App. 8) Because Petitioner "has been held to no more onerous requirements for admission to the North Carolina bar than any other citizen of North Carolina," the court of appeals concluded that Petitioner's constitutional challenge failed. (Pet. App. 9) The court of appeals voted unanimously to deny rehearing en banc.

REASONS FOR DENYING THE PETITION

Petitioner contends that the rules of the North Carolina State Board of Law Examiners with respect to admission to the State Bar violate the Commerce Clause. Petitioner, however, failed to make any argument based upon the Commerce Clause to either the district court or the court of appeals. Accordingly, the present petition constitutes a poor vehicle for resolving the question presented in the petition. Petitioner also asserts that rules of the Board of Law Examiners violate the Privileges and Immunities Clause and Equal Protection Clause. The court of appeals correctly rejected these arguments, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

I. THE PRINCIPAL ISSUE UPON WHICH THE PETITION IS BASED WAS NOT RAISED BELOW.

Petitioner's complaint does not include a cause of action based upon the Commerce Clause. In fact, the complaint contains no reference to the Commerce Clause. Rather, Petitioner's complaint is limited to an assertion that the rules of the Board of Law Examiners violate "the United States

Constitution, Article IV, section 2 Privileges and Immunities Clause and the Fourteenth Amendment Equal Protection, Privileges and Immunities, and Right to Interstate Travel Clauses." (Complaint ¶¶ 28 & 33) In the briefs he filed with the district court, Petitioner failed to rely on the Commerce Clause as a basis for attacking the applicable rules. The district court's opinion therefore fails to contain any reference to the Commerce Clause.

Petitioner also failed to make any argument to the court of appeals based upon the Commerce Clause. Judge Widener's decision makes clear that Petitioner's laundry list of alleged constitutional defects does not include the Commerce Clause:

> In this 42 U.S.C. § 1983 case, Steven C. Morrison, an attorney, filed suit alleging that the requirements by the Board of Bar Examiners for obtaining comity admission to practice law in North Carolina under its Rule .0502(3) violate the Privileges and Immunities Clause of Article IV, § 2; the Equal Protection Clause of the Fourteenth Amendment; and the Privileges or Immunities Clause of the Fourteenth Amendment.

(Pet. App. 2)

Petitioner seeks to rely upon the Commerce Clause for the first time in his petition for certiorari. This Court has repeatedly stated, however, that "'[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206, 212-13 (1998) (quoting

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). "Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (citation omitted). In that Petitioner is seeking to attack the decision of the court of appeals based upon an argument not raised or presented to that court, the petition should be denied.

Only in "exceptional circumstances" will this Court consider an issue not raised below. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (issuance of new program instruction by Department of Health, Education, and Welfare after the filing of the jurisdictional statement justified remanding to court of appeals to consider new constitutional issue presented). No such exceptional circumstances exist here. Petitioner had every opportunity to assert a claim based upon the Commerce Clause to the courts below but simply failed to pursue such a claim. By not raising the issue below, Petitioner has deprived this Court of both a factual record and the benefit of a reasoned opinion by the district court and court of appeals. The absence of a factual record is particularly significant given that Petitioner bases his Commerce Clause claim upon *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). In *Great Atlantic & Pacific Tea Co.*, the Court rejected Mississippi's argument that the reciprocity provision at issue helped Mississippi ensure that milk standards of other States were equivalent to Mississippi's safety standards. The Court

found this argument to be frivolous because Mississippi, under the applicable statute, would accept out-of-state milk below the standards that Mississippi imposed upon milk produced in the State. Here, however, there has been no factual determination regarding the standards of the States that fall within the scope of North Carolina's comity provision. Moreover, Rule .0502 gives the Board of Law Examiners the discretion whether or not to admit an applicant. Thus, the Board has specific authority to turn away applicants who fall below North Carolina's standards.

In any event, Petitioner's Commerce Clause argument is without merit. The petition relies upon three Commerce Clause cases – *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976) (striking Mississippi statute that precluded importation of milk from States that did not accept Mississippi milk on a reciprocal basis), *Sporhase v. Nebraska,* 458 U.S. 941 (1982) (striking Nebraska statute that precluded taking ground water from Nebraska to another State unless that State reciprocated) and *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269 (1988) (invalidating Ohio statute that granted a tax credit with respect to ethanol produced in Ohio or produced in a State that gave similar credits to Ohio ethanol). Each of those cases involve a State precluding or hindering the movement of tangible physical property across State lines in order to protect its own economic interests. Citing these three cases, Petitioner treats the practice of law like a fungible commodity. The practice of law, however, is not a commodity. Accordingly, state courts have traditionally had authority "to control who may be admitted to practice before them." *Leis v. Flynt,* 439 U.S. 438, 444 n.5 (1979) (*per curiam*). As this Court observed in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975),

"[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"

Petitioner's argument for granting certiorari is that Rule .0502(3) has protectionist overtones like the statute at issue in *Great Atlantic & Pacific Tea Co.* Petitioner, however, fails to recognize that an attorney who has the requisite legal knowledge to practice in one jurisdiction will not necessarily have the requisite knowledge to practice in another jurisdiction. When a State such as California requires all bar applicants (regardless of whether the applicant is already admitted to the bar of another State) to sit for its bar exam, that State is effectively declaring that its state statutes, common law and rules of practice are unique. *See infra* pp. 17-18. Accordingly, North Carolina is not acting out of protectionist interests when it defers to California's pronouncement (i.e., the ability to practice law in California is not interchangeable with the ability to practice law in the other 49 States).

Petitioner cannot cite to a single judicial decision in which a comity rule relating to the licensing of attorneys has been held to violate the Commerce Clause. Given this paucity of authority, this Court should reject Petitioner's request to reach out and take this issue when the issue was neither presented nor ruled on below. *See United States v. Galletti,* 541 U.S. 114, 120 n.2 (2004); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38-39 (1989); *Kosak v. United States,* 465 U.S. 848, 850 n.3 (1984); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *United States v. Lovasco,* 431 U.S. 783, 788 n.7 (1977).

II. THE FOURTH CIRCUIT CORRECTLY APPLIED WELL SETTLED LAW WITH RESPECT TO PETITIONER'S CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

Petitioner asserts that Rule .0502(3) violates the Privileges and Immunities Clause of Article IV, section 2 and the Fourteenth Amendment Privileges or Immunities Clause. Rule .0502(3), however, is not tied to residency nor does it discriminate based upon residency. Additionally, as Petitioner concedes, there is no conflict among the courts as to whether a comity requirement of the sort at issue here violates the Privileges and Immunities Clause. (Pet. 13) Accordingly, Petitioner's claims under Article IV, section 2 and the Fourteenth Amendment do not merit further review by this Court.

A. Article IV, Section 2

Article IV, section 2 of the Constitution provides that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This provision "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). As both the district court and court of appeals below recognized, Petitioner, as a citizen and resident of North Carolina, may not assert a claim based upon Article IV, section 2. This clause provides "no security for the citizen of the State

in which [the privileges] were claimed." *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 77 (1873).

In *United Bldg. & Constr. Trades Council v. Mayor of Camden,* 465 U.S. 208 (1984), for example, this Court was faced with a challenge to a Camden, New Jersey ordinance that required that at least 40 percent of the employees of contractors and subcontractors working on city construction projects be residents of the city. This Court allowed the action to go forward under Article IV, section 2 only because the appellant trade council included "members who reside outside New Jersey." *Id.* at 212 n.4. Citing the *Slaughter-House Cases,* this Court noted that "the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause." 465 U.S. at 217. As a resident of North Carolina, Petitioner cannot attack Rule .0502(3) based upon Article IV, section 2.[2]

B. The Fourteenth Amendment Privileges or Immunities Clause

Section 1 of the Fourteenth Amendment states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." In *Saenz v. Roe,* 526 U.S. 489 (1999), this Court held that the Fourteenth Amendment Privileges or Immunities Clause precludes a State from infringing upon the right to travel. This

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[2] In *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985) and *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988), this Court recognized that Article IV, section 2 precludes a State from discriminating against bar applicants based upon residence. The rules at issue here, however, have no residency requirement and do not treat an applicant differently based upon the applicant's residency.

right to travel protects: (1) the right of a citizen of one State to enter and leave another State, (2) the right to be treated as a welcome visitor, rather than an unfriendly alien, when temporarily present in another State and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Id.* at 500. In *Saenz*, this Court held that a California statute that provided reduced welfare benefits for persons who resided in California for less than a year violated this right to travel and therefore could not stand under the Fourteenth Amendment.

Although Petitioner asserts that Rule .0502(3) should be struck based upon *Saenz*, the *Saenz* decision provides no support for his argument. In *Saenz*, the California statute was found to be unconstitutional because it violated "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Id.* at 502. This Court recognized that "the right to travel embraces the citizen's right to be treated equally in her new State of residence." *Id.* at 505. As the court of appeals correctly concluded, Petitioner cannot show that as a new citizen and resident of North Carolina he has been treated any differently from other North Carolina citizens.

Rule .0502(3) does not disadvantage an out-of-state resident. Moreover, it does not give a long-standing North Carolina resident any advantage over new North Carolina residents. Both residents and non-residents are eligible for admission to the practice of law in North Carolina as a result of having been admitted to the bar of certain other specified States and actively practicing for four of the last six years in that State. This option is available equally to North Carolina residents and to non-residents, and both are bound by the same

requirements. All comity applicants – regardless of whether they have moved to North Carolina prior to applying or still reside in some other State – must prove the same active and substantial full-time practice in a comity State during the relevant six year period immediately preceding the date of their application. The Rule treats persons actively and substantially practicing law in a State that has comity differently from those practicing in a State that does not have comity. Residency, past or present, has nothing to do with that difference. Because Petitioner has been treated no differently from other North Carolina residents, his claim under the Fourteenth Amendment Privileges or Immunities Clause fails. *See Saenz,* 526 U.S. at 506-07; *Russell v. Hug*, 275 F.3d 812, 822 (9th Cir. 2002).

C. *Supreme Court of Virginia v. Friedman*

In discussing Article IV, section 2 and the Fourteenth Amendment, Petitioner asserts that the court of appeals' decision is inconsistent with this Court's holding in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). (Pet. 13-14) Specifically, Petitioner argues that the Fourth Circuit rested its decision on "the now clearly impermissible ground that the applicant could always take the bar exam." (Pet. 13) Petitioner then argues that the court of appeals' decision is therefore inconsistent with *Friedman*. In making this argument, however, Petitioner completely mischaracterizes the court of appeals' decision.

The only mention of the bar examination alternative comes in the final paragraph of the court of appeals' opinion. In this final paragraph, the court of appeals reiterates its holding that Petitioner "has been held to no more onerous

requirements for admission to the North Carolina bar than any citizen of North Carolina." (Pet. App. 9) The opinion observes that Rule .0502(3) is a "valid rule" and Petitioner has not met the requirements of this rule. The paragraph then concludes as follows: "Thus, [Petitioner] must seek an alternative method of gaining admission, such as taking the bar exam, as do all the other North Carolina lawyers similarly situated." (Pet. App. 9 (emphasis supplied))

Plainly, the court of appeals was reinforcing its holding that Petitioner was being treated the same as all other applicants irrespective of their residence. In this sentence, the court of appeals was merely recognizing that because Petitioner did not meet the requirements of Rule .0502(3), he would have to sit for the bar exam to gain admission to the North Carolina bar. The court of appeals' opinion is wholly consistent with decisions of this Court involving the Privileges and Immunities Clause.

III. THE FOURTH CIRCUIT CORRECTLY APPLIED WELL SETTLED LAW WITH RESPECT TO PETITIONER'S EQUAL PROTECTION CLAIM.

The law with respect to an equal protection claim is well settled by this Court's prior decisions. Petitioner's equal protection claim merely asserts that the court of appeals erred in its application of these settled principles to the facts before the court. The court of appeals correctly applied this Court's precedent. Accordingly, Petitioner's equal protection claim does not merit further review by this Court.

This Court has repeatedly held that unless a classification involves a fundamental right or discrimination along suspect lines, the rational basis test must be used in determining whether governmental action violates equal protection. *See, e.g., Central State Univ. v. American Ass'n of Univ. Professors,* 526 U.S. 124, 127-28 (1999). The courts of appeals have uniformly held that the right to practice law is not a fundamental right for purposes of equal protection analysis. *See, e.g., Tolchin v. Supreme Court of New Jersey,* 111 F.3d 1099, 1113-15 (3d Cir.), *cert. denied,* 522 U.S. 977 (1997); *Scariano v. Justices of the Supreme Court,* 38 F.3d 920, 924 (7th Cir. 1994), *cert. denied,* 515 U.S. 1144 (1995); *Schumacher v. Nix,* 965 F.2d 1262, 1268 n.9 (3d Cir. 1992); *Edelstein v. Wilentz,* 812 F.2d 128, 132 (3d Cir. 1987); *Jones v. Bd. of Comm'rs,* 737 F.2d 996, 1000-01 (11th Cir. 1984); *see also Leis v. Flynt,* 439 U.S. 438, 443 (1979) (*per curiam*) (Constitution does not "require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another"). Moreover, Rule .0502(3) does not discriminate based upon a suspect classification. Accordingly, the court of appeals properly analyzed Petitioner's equal protection claim under the rational basis test.[3] *See Nordgren v.*

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[3] Petitioner argues at length that a rational basis test is not appropriate because Rule .0502(3) was adopted by a state board rather than the North Carolina General Assembly. (Pet. 18-19) Petitioner's argument is frivolous. *See Jones v. N.C. Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) (applying rational basis review to regulation adopted by North Carolina Department of Correction). Additionally, Petitioner argues that his challenge to the Rule is entitled to heightened scrutiny because he has asserted a claim under the Privileges and Immunities Clause. (Pet. 16) As

Hafter, 789 F.2d 334, 338-40 (5th Cir.), *cert. denied*, 479 U.S. 850 (1986); *Lupert v. California State Bar*, 761 F.2d 1325, 1327 n.2 (9th Cir.), *cert. denied*, 474 U.S. 916 (1985); *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059, 1062-63 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984).

Under the rational basis standard, a classification "'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). "[W]hen conducting rational basis review 'we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). Rational basis review "'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller*, 509 U.S. at 319 (quoting *Beach Communications*, 508 U.S. at 313). Accordingly, a "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller*, 509 U.S. at 319. Rule .0502(3) is rationally related to the interest of the State of North Carolina in ensuring that persons who are licensed by the State to practice law are competent to do so.

Numerous States, including California, require that all applicants must sit for the bar exam, regardless of whether the

---

set out above, his claim under the Privileges and Immunities Clause is without merit.

applicant has previously passed the bar exam of another State. Such a requirement is clearly constitutional. When California refuses to admit practicing attorneys from another State unless that attorney sits for the California bar exam, California is effectively declaring that (1) its statutory code, common law and rules of practice are unique from that of other States and (2) knowledge of the law of another State does not necessarily render that attorney qualified to practice law in California. Thus, California has essentially declared that the knowledge base necessary to competently practice law in California is different from the knowledge base necessary to practice law in the other 49 States. It is rational and reasonable for the Board to rely upon the conclusion of California lawmakers that California law is unique from the law of the other 49 States. The Equal Protection Clause does not prohibit or preclude the Board from deferring to California as to whether the legal knowledge necessary to practice law in California is interchangeable with the legal knowledge necessary to practice law in other States of the Union.

Knowledge of the law is not a fungible commodity. The law of each of our 50 States is different. Certain States have appropriately concluded that their state laws are so unique that attorneys who practice in that State are not simply interchangeable with attorneys of another State. When a State such as California comes to such a conclusion, other States are entitled to defer to that determination. Such deference is not so arbitrary and irrational as to violate the Equal Protection Clause.

Additionally, Rule .0502(3) serves the legitimate state interest of facilitating the ability of attorneys to readily move their practice to another State and to represent clients across

state borders. A state rule that facilitates the ability of attorneys to move throughout the country, provided the rule does not discriminate based upon residency, serves a legitimate purpose. Petitioner argues that Rule .0502(3) may, in fact, be counterproductive to this goal because it may encourage States with broad admission policies to copy North Carolina's approach. (Pet. 19) In so arguing, Petitioner ignores the admonition of this Court that the Equal Protection Clause does not allow "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). The court of appeals correctly rejected Petitioner's equal protection claim.

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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No. 06-499

FILED
DEC 2 2 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

STEVEN C. MORRISON,

Petitioner,

v.

BOARD OF LAW EXAMINERS
OF NORTH CAROLINA et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Andrew Perlman, "A Bar Against Competition: the Unconstitutionality of Admission Rules for Out-of-State Lawyers," 18 Geo. J. of Legal Ethics 135 (2004) 3

The Petition challenges two related provisions of respondents' Rule .0502(3) on admission by motion: the requirements (a) that the jurisdiction in which an applicant is already admitted must grant reciprocity to members of the North Carolina Bar, and (b) that the applicant must have actively practiced for four out of the last six years in the jurisdiction from which admission by reciprocity is sought. On the main challenge, respondents argue that this case is a "poor vehicle" (Opposition at 6) and that the decision below is correct. On the "four of the last six years" requirement, respondents do not contend that there are any "vehicle" problems, but, like the court of appeals, they make no effort to defend that provision apart from the general reciprocity requirement. We review the opposition to each provision separately.

I. The Reciprocity Requirement.

Respondents correctly observe that petitioner did not raise a Commerce Clause challenge in his papers below, nor did he cite the principal Commerce Clause cases on which he now relies, *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976) ("*A&P*") and its progeny. Respondents admit, however, that petitioner challenged the constitutionality of the reciprocity provision under both Privileges and Immunities Clauses and under the Equal Protection Clause, and both lower courts ruled on the challenge. And respondents do not claim that this Court lacks jurisdiction to consider the Commerce Clause challenge or the *A&P* line of cases. Moreover, those cases are also relevant on the Equal Protection and Privileges and Immunities challenges, since if a state interest is not legitimate under the Commerce Clause, it cannot be

invoked to defend this rule even under a rational basis test.[1]

Although respondents moved for summary judgment, they now suggest, as a reason for this Court not to decide the Commerce Clause challenge, that there are facts that are lacking for a proper adjudication (Opp. at 8-9). They argue that, under *A&P*, petitioner must show that the admission standards in California, where he most recently practiced, are equivalent to those in North Carolina, and because there is no evidence on this issue, the Court should not decide it. But respondents misread both *A&P* and their own rule. While *A&P* did observe that Louisiana's standards were equal to those in Mississippi, the decision did not turn on that fact. Rather, what was critical to the Court was that Mississippi would have accepted the milk from Louisiana even if Louisiana's standards were "lower" – so long as Louisiana granted Mississippi producers reciprocal treatment. 424 U.S. at 375.

That is precisely the situation here. If California amended its bar admission rules today and allowed North Carolina lawyers to be admitted on motion on a reciprocal basis, respondents would automatically, with no investigation

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[1] The Petition contended (18-19) that, because the reciprocity rule was issued by practicing lawyers, rather than by a court or legislature, the deference that might apply to a court rule does not apply here. Respondents counter by citing *Jones v. N.C. Prisoners' Labor Union Inc.*, 433 U.S. 119 (1977), in which this Court applied a rational basis test to a decision of the state board of corrections, not the legislature. Opp. at 16, n. 3. But that board was made up of full-time state officials, not, as here, of private citizens whose only "government" status is derived from their selection by the Council of the North Carolina Bar to serve on the part-time Board of Law Examiners.

of California's bar admission standards, add California to its list of comity states, and petitioner could be admitted on motion, because that is precisely what Rule .0502(3) provides. This undisputable fact wholly undermines respondents' claim that North Carolina is simply deferring to the judgment of California that its laws are "unique" (Opp. at 10), which is why everyone seeking admission there must take the California bar exam and why North Carolina cannot admit California lawyers unless they take the North Carolina exam.[2] Indeed, one state on respondents' approved list – Wisconsin (App. 48) – does not even require graduates of its two in-state law schools to take a bar exam at all, Wisconsin Supreme Court Rules 40.02(2) & 40.03(2), which surely undercuts respondents' claim that only those states with admission standards equal to those in North Carolina will be admitted without examination. Furthermore, the affidavit submitted by respondents' executive director never suggested that the State attempted to determine whether in fact the admission requirements of other States were comparable to those of North Carolina (App. 38-40), and none of respondents' briefs until its opposition in this Court suggested that Rule .0502(3) requires any such determination.

On the merits of the Commerce Clause challenge, respondents point out (Opp. at 9) that the *A&P* line of

[2] The main reason that California and other warm-weather States like Florida, Hawaii, and Arizona require everyone to take a bar exam is the same one that produced the residence requirements for bar admission, which this Court has held to be unconstitutional: to protect the economic interests of members of their bars. *See* Andrew Perlman, "A Bar Against Competition: the Unconstitutionality of Admission Rules for Out-of-State Lawyers," 18 Geo. J. of Legal Ethics 135, 137 n. 5 (2004).

cases all involve tangible property. However, in the very same paragraph, they cite *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), which is an antitrust case in which this Court held that the agreement in restraint of the provision of legal services there had a substantial effect on interstate commerce, 421 U.S. at 783-786, thereby rejecting respondents' contention that rules governing the delivery of legal services are outside the purview of the Commerce Clause. As the facts here demonstrate, Rule .0502(3) plainly inhibits the movement of lawyers and their ability to deliver interstate legal services, and respondents do not argue otherwise. *See also* Brief of Association of Corporate Counsel as *Amicus Curiae* in Support of the Petition at 4-6.

The portion of the *Goldfarb* opinion quoted by respondents suggests the possibility of some different treatment for legal services under the antitrust laws, but not under the Constitution. Thus, in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), this Court rejected an antitrust challenge to the State's advertising rules, but then struck them down under the First Amendment. Even more relevant to this case, this Court has had four separate post-*Goldfarb* challenges to bar admission rules, and in every case found them to be unlawful.[3] Those decisions are not dispositive of petitioner's challenge to respondents' reciprocity rule, but, in combination with the *A&P* line of cases, they strongly suggest that the rule is inconsistent

[3] *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985); *Frazier v. Heebe,* 482 U.S. 641 (1987); *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988); *Barnard v. Thorstenn,* 489 U.S. 546 (1989).

with this Court's teachings and that it faces a very uphill road if it is to be sustained.

Respondents also fail to confront the argument that the Petition makes (at 10-11) on why the decision below is also in conflict with *Saenz v. Roe,* 526 U.S. 489 (1999). In *Saenz,* California reduced its welfare benefits to some applicants depending on the benefits that were allowed in the state from which they came. That is precisely the same kind of discrimination as the discrimination based on state of prior admission that respondents have enacted here: North Carolina discriminates against some applicants for bar admission based on whether their former state of practice has comity with North Carolina. Just as the level of benefits granted by a welfare applicant's prior state of residence had no legitimate bearing on an applicant's current need for welfare, so the willingness of a lawyer's prior state of admission to allow North Carolina lawyers to be admitted without examination has nothing to do with whether that lawyer is qualified to provide competent and honest legal representation in North Carolina.

There is one other point worth noting about respondents' argument that the Court should deny review of the Commerce Clause challenge because this case presents a "poor vehicle" for deciding the question. North Carolina is one of twenty-three states with reciprocity provisions, and it should now be clear to lawyers, the likely challengers to these reciprocity rules, that there is a serious question about their constitutionality, as evidenced by this Court's request for a response to the Petition after respondents filed a waiver. Thus, there can be little doubt that a similar case would be brought again if this Court were to deny review because the Commerce Clause issue was not argued below. Because the Court is likely to take the issue

at some time, there seems little reason to postpone the day of reckoning when all the relevant facts are in the record and the lower courts are not heeding this Court's decisions that bear on these issues.

II. The "Four of the Last Six Years" Requirement.

Petitioner's second challenge is to the requirement that applicants must have practiced law in a state having reciprocity with North Carolina for four of the last six years, which disqualified petitioner even though he was also licensed in Ohio and Indiana, which are reciprocity states with North Carolina. Thus, although petitioner had practiced for the four of the last six years under a California license, that did not "count" under North Carolina's rule, because California is not a reciprocal state. Respondents do not dispute that, if petitioner had reversed the order of his bar admissions and practices, beginning with California and ending with either Ohio or Indiana, he would have met the requirements of Rule .0502(3). It is this irrationality that is at the heart of this portion of petitioner's challenge.

Respondents make no claim that this issue was not fully presented below. Instead of defending this provision on the merits, they follow the example of the court of appeals: they simply do not address it separately, but fold all their arguments into their defense of the basic reciprocity rule under an Equal Protection challenge, using a rational basis analysis. *But see* Petition at 18-19 and note 1 *supra,* arguing for heightened scrutiny. Respondents' failure to analyze this requirement separately from the basic reciprocity challenge is all the more remarkable

since this provision was the basis on which the district court ruled for petitioner.

Like the reciprocity requirement, the "four of the last six years" rule has nothing to do with a lawyer's qualifications to practice law in North Carolina. Rather, they are both solely intended to help North Carolina lawyers gain motion admission elsewhere, thereby placing them in conflict with the *A&P* line of cases and with the teachings of this Court in the bar admission cases relied on by petitioner, even if the actual holdings in those cases do not involve precisely this situation. To be sure, there may yet be an unarticulated basis that would justify the discrimination created by respondents' "four of the last six years" requirement, but to date, they have not advanced one to support its facial irrationality.

CONCLUSION

The Petition presents a legal issue of great importance to practicing lawyers who wish to gain admission by motion to the bars of nearly half the States that condition such admission on reciprocity from the State in which the lawyer is already admitted. The Petition and this Reply demonstrate that this case properly presents the issues and shows that respondents' rule is in conflict with a significant number of decisions of this Court. Accordingly, this Court should grant review to resolve the status of these reciprocal bar admission rules.

Respectfully submitted,

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December 2006

MOTION FILED
OCT 3 1 2006

(2)

No. 06-499

In the Supreme Court of the United States

STEVEN C. MORRISON,
PETITIONER,

v.

BOARD OF LAW EXAMINERS
OF NORTH CAROLINA, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Association of Corporate Counsel ("ACC") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief; respondents have not responded to our request for consent.

The ACC is a non-profit bar association of attorneys practicing in the legal departments of public, private, and not-for-profit corporations and other private-sector organizations. ACC promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. With more than 20,000 members employed by over 8,000 organizations in 55 countries, ACC represents attorneys in both large and small companies, including 98 of the Fortune 100 companies, and 74 of the Global 100 companies.

One of ACC's principal missions is to serve as the voice of the in-house bar. This occurs not only in connection with matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house counsel to their companies, but also on broader issues relating to the regulation of the legal profession generally, including how outside counsel to ACC members' clients perform their duties and are regulated. Accordingly, ACC consistently promotes standards that facilitate the effective and efficient practice of law and opposes standards that interfere with that objective, including state bar requirements that discriminate against or burden the efficient, coordinated, and seamless flow of corporate legal services across jurisdictional boundaries.

ACC's primary interest as *amicus curiae* in this case arises from the profound implications of the Fourth Circuit's decision on the ability of ACC's members to serve their clients and on their corporate employers' ability to receive effective and economical legal representation from outside and in-house counsel. Modern and sophisticated corporate clients must operate in an increasingly national, and often international, business climate in order to compete and flourish. It is imperative for the legal profession to grow with clients' needs, unhindered by outdated and unconstitutional practice barriers that artificially and unnecessarily preclude otherwise qualified and competent corporate lawyers from fully and readily serving the expanding geographical legal needs of their clients. These artificial practice barriers protect neither the public nor clients: rather, they merely create obstacles that significantly impede corporate clients' freedom to hire expert counsel of their choice or to relocate in-house legal staff with whom they have a longstanding and trusted professional relationship. Because the North Carolina reciprocity provisions at issue in this case unconstitutionally impair these objectives, ACC submits this brief in support of the petition for certiorari that seeks review of the Fourth Circuit's decision upholding those provisions.

Accordingly, the motion for leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The Association of Corporate Counsel ("ACC") is a non-profit bar association for attorneys practicing as in-house counsel in the legal departments of domestic and international public, private, and not-for-profit corporations and other private-sector organizations. The interest of ACC as *amicus curiae* is set forth in the accompanying motion for leave to file this brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

It is well established, and not contested in this case, that states have the constitutional authority to regulate the legal profession and the practice of law. This includes the admission of attorneys to the state bar. *See Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). Furthermore, this Court has recognized that a lawyer admitted in one state does not have a constitutional right automatically to be allowed to practice in another state. *See Leis v. Flynt*, 439 U.S. 438, 443 (1979).

At the same time, it is equally well settled that a state "cannot exclude a person from the practice of law . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware*, 353 U.S. at 238-39. Furthermore, although a state can set appropriate standards of legal competence and good character for admission to its bar, "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239. As Judge Craven previously explained for a three-judge district court with specific reference to the North Carolina bar, "[i]n licensing attorneys there is but one constitutionally permissible state objective; the assurance that the applicant is capable and fit to practice law." *Keenan v. Board of Law Examiners of North*

1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel for a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae*, its members, or counsel.

Carolina, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court). *See* Pet. 2 (North Carolina bar statutes and rules). Thus, the National Conference of Bar Examiners recognizes that "[s]tate standards of qualification . . . must have a rational connection with the applicant's fitness or capacity to practice law." National Conference of Bar Examiners, THE BAR EXAMINERS' HANDBOOK 20:103 (3d ed. 1991).

The reciprocity provisions adapted by the bar of North Carolina (and those of approximately 22 other states, *see* page 10, *infra*) squarely raise the issue of the constitutional limits on state requirements imposed for bar admission without examination. The North Carolina reciprocity requirements are arbitrary and irrational and serve as protectionist barriers that impede the ability of out-of-state lawyers to gain admittance in North Carolina.

In recent years, the practice of law unquestionably has become interstate (and international) in nature. This largely reflects the needs of clients in a national (and global) economy. State regulation of the legal profession, however, was born in another era, when businesses were largely local and lawyers were primarily engaged in practice before the courts of a single state. Because the practice of law has changed and the regulation of lawyers has not, the state licensing system has failed to keep up with this development. The reciprocity provisions imposed by North Carolina and 22 other states lead to arbitrary and irrational results for lawyers required to comply with the burdens of multistate practice regulation. This impedes the interstate practice of law and interstate movement of lawyers, but fails to serve the states' legitimate objective of ensuring the competence and fitness of the attorneys admitted to their bars.

The focus of state bar regulation increasingly has shifted from the legitimate ends of protecting the public toward the illegitimate ends of protecting local practitioners from competition from their peers who are qualified to practice but licensed in other states. It is not unusual, unfortunately, for state

bars to adopt various means to protect the interests of their locally admitted members. For example, they widely erected residency requirements, but this Court repeatedly invalidated those measures. North Carolina's reciprocity provisions represent the next generation of restrictive bar requirements, and petitioner's challenge to reciprocity requirements is the latest battle in this continuing war to free lawyers, their clients, and the Nation's economy from the parochial restraints of state bar organizations.

The question of the constitutionality of these reciprocity provisions warrants this Court's review. Such requirements are common among the states and present an issue of recurring importance. As the practice of law has become more national (and international) in nature and the mobility of lawyers has increased, state restraints on multi-jurisdictional practice have imposed ever-greater burdens on clients' choice of counsel, the expert practice of substantive law which is not limited by the boundaries of states and nations, and the inter-connected nature of our world economy. This has had particularly adverse effects on corporate lawyers and the corporate clients they represent. *See* Richard L. Abel, AMERICAN LAWYERS 124 (1989) ("easing of interstate mobility will be particularly important to house counsel"). The circumstances of this case fully illustrate these problems. Accordingly, the petition for a writ of certiorari should be granted. *See* National Conference of Bar Examiners at 20:103-04, 20:107 (recognizing that "much of the states' discretion in dealing with bar admissions has been eliminated by the cloaking of bar applicants with constitutional protections" and that reciprocity requirements "are ripe for challenge").

I. THE MODERN PRACTICE OF LAW HAS BECOME INHERENTLY INTERSTATE IN ORDER TO SERVE CLIENTS' NEEDS, AND NORTH CAROLINA'S RECIPROCITY PROVISIONS FAIL TO REFLECT THIS DEVELOPMENT OF THE LEGAL PROFESSION.

Our legal system, like the national (and international) economy, has undergone rapid and profound change in recent years. In particular, the practice of law has been largely transformed in the last few decades.

As Justice Stevens noted in his dissent in *Leis*, "the nature of law practice has undergone a metamorphosis." 439 U.S. at 449 (Stevens, J., dissenting). "Interstate law practice and multi-state law firms are now commonplace," and "'[m]ulti-state or interstate practice by attorneys in this country is an expanding phenomenon.'" *Id.* at 449 n.8 (citation omitted).

National bar organizations and academic commentators similarly have observed this fundamental change in the practice of law. A report of the American Bar Association Commission on Multijurisdictional Practice, noting "the changing nature of law practice," explains the "general consensus" that "cross-border legal practice" is "on the increase" and that "this trend is not only inevitable, but necessary." AMERICAN BAR ASSOCIATION, *Report of the Committee on Multijurisdictional Practice* (Aug. 2002) at 3, 10. *See also, e.g.*, Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 668 (1995).

This now-familiar development in the legal profession has been attributed to a number of factors. For example, clients large and small, from every industry, increasingly are involved in disputes or transactions that cross state lines and thus need multi-state legal services. Especially as law practice has become more specialized, corporate clients depend on lawyers who have expertise in a particular substantive area of law as it is applied

across jurisdictional lines; clients look to hire lawyers who can meet their needs wherever legal representation is required. While local counsel will always play a vital role, there is an increasingly great need for national and even international counsel. This, in turn, has been facilitated by a growing degree of uniformity in state law in a host of areas and the enhanced scope and applicability of federal law. Finally, the greater mobility of lawyers and the existence and prominence of large multi-state and even international law firms also play an important role in this development. *See, e.g. Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987); *Leis*, 439 U.S. at 449 & nn.6, 8 (Stevens, J., dissenting); ABA Report at 3, 10-12; Wolfram at 668-69; Gerald J. Clark, *The Two Faces of Multijurisdictional Practice*, 29 N. KY. L. REV. 251, 263-64 (2002).

In assessing this development, it is critical to keep in mind the needs of the client and lawyers' paramount obligation to serve their clients. *See Leis*, 439 U.S. at 445 n.2 (Stevens, J., dissenting). Noting "our tradition of respect for client choice," the ABA Report explains that there is a "need for lawyers to cross state borders to afford clients competent representation" and that "[t]he existing system of lawyer regulation has costs for clients." ABA Report at 5, 10, 12. *See also* Deborah L. Rhode, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 154 (2000); Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 476 (1997); *see generally United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (discussing right to counsel of client's own choosing).

Unjustified restrictions on the multijurisdictional practice of law severely burden corporate clients in a variety of ways. *See, e.g.*, ABA Report at 10-12; Wolfram at 668-69. For example, in litigation or transactions that involve more than one state, as complex and even many routine legal issues do today, these restrictions require companies to have legal representation in multiple (sometimes all 50) states. In turn, this restricts their

ability to retain outside counsel of their choice who is expert in the area of law and who is familiar to the client but not licensed in every one of the states in question. It also impairs their ability to achieve coordinated and effective compliance with the law across the company as a whole. And it necessarily increases the cost of legal services to the client.

Similarly, such restrictions require companies to have in-house lawyers admitted in every jurisdiction where they operate or legal disputes arise. Thus, instead of one corporate attorney who is expert in the particular area of law, they need to have a multiplicity of lawyers, thereby interfering with efficient staffing and internal flexibility and again driving up legal costs.

Finally, these restrictions also undermine companies' ability to retain or hire lawyers by discouraging outside or in-house counsel from relocating to take new positions because of the significant deterrent posed by arbitrary admission rules and the prospect that an experienced lawyer would again have to take the bar exam (perhaps in multiple jurisdictions). This case graphically illustrates these concerns for corporations and for the legal profession.

Unfortunately, state bars have not, in general, kept up with the fundamental changes in the legal profession. Historically, "few restrictions on interstate law practice existed. . . . '[U]ntil the 1930s, lawyers admitted in one state encountered few impediments in practicing in another.'" Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 145 (2004), *quoting* Abel at 124.

With the Depression, however, "[s]tarting in the 1930s, state bars increasingly 'sought to protect their markets from out-of-state lawyers.'" *Id.* at 148, *quoting* Abel at 124. "One prominent legal ethicist, Professor Charles Wolfram, has captured the essence of what many commentators have found:

> '[T]he states [today] are by and large quite restrictive about admitting out of state lawyers. . . . The reasons

> given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state lawyers . . . by competition with out-of-state lawyers.'

Id. at 147, *quoting* Wolfram at 679. Thus, as this Court has noted, according to a former president of the American Bar Association, "'[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition.'" *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.18 (1985), *quoting* Chesterfield Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978). *See also, e.g.*, Perlman at 138, 147-50, 170, 178; Clark at 254, 265; Needham at 467, 475-76.

State bar regulation continues to amount to guild-like protectionism for local lawyers and fails to reflect the profound changes that have occurred in the legal profession and the multi-state practice of law. As the ABA Report succinctly summarizes: "Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution." ABA Report at 3. Instead of "catch[ing] up with the changing realities of the practice of law," the perpetuation of restraints on multi-jurisdictional practice embodies "semi-official professional mythology about the largely bygone world in which the bar's leadership appears to believe it continues to practice . . . [and in particular] the myth of the single-state practitioner." Wolfram at 670. These restraints on "interstate practice are both real and substantial, and they reflect poor state policy. . . . [Such limits] either must ignore the present realities and desirability of interstate dealings by clients or be rooted in concern for the competitive advantage of local lawyers that ill serves a vibrant national economy." *Id.* at 713. *See also* Rhode at 154 ("[s]uch reciprocity rules are difficult to justify from any consumer protection perspective"); Clark at 264-65. As a result, although "[l]awyers recognize that the geographic scope of a lawyer's

practice must be adequate to enable the lawyer to serve the needs of clients in a national and global economy," state bar rules "impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively." ABA Report at 3.

State bar protection has taken different forms over time. For example, residency requirements once were widely used to exclude out-of-state lawyers. In a series of decisions, this Court invalidated such restrictions. *See Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Piper*, *supra*; *see also Frazier v. Heebe*, *supra* (residency requirement for federal district-court bar was irrational and unnecessary to serve the purpose of attorney competence). In addition, in some instances out-of-state lawyers have been excluded by application of *pro hac vice* rules. *See*, *e.g.*, *Gonzalez-Lopez*, *supra*. *See also Maw v. Calogero*, *petition for cert. pending*, No. 05-1645 (filed June 23, 2006), and *Leclerc v. Webb*, *petition for cert. pending*, No. 06-11 (filed June 22, 2006), *orders inviting Solicitor General to file briefs* (Oct. 2, 2006).

The reciprocity provisions adopted by respondents (and the bars of 22 other states) are the latest manifestation of this same problem. Such requirements are arbitrary, irrational, unrelated to the protection of the public, and onerous to out-of-state lawyers and their clients. There can be no doubt about the significance of this issue to our legal system and to our economy in general. In *Piper*, this Court explained both that "the practice of law is important to the national economy" and that "the legal profession has a noncommercial role and duty" that underscore the broad public consequences of bar limitations.

Furthermore, such restraints are not self-correcting. "The history of bar reform suggests that necessary changes often occur only after significant litigation." Perlman at 178. This is hardly surprising; "[o]nce admitted to the bar, lawyers have little incentive to eliminate arbitrary or overbroad restrictions if the

effect would be to increase the number of potential competitors." Rhode at 154.

In the past, this Court has been vigilant to grant review to foreclose unconstitutional efforts by state bars to exclude out-of-state lawyers. It should be no less vigilant here.

II. THE NORTH CAROLINA RECIPROCITY PROVISIONS ARE IRRATIONAL AND BURDENSOME AND ARE UNNECESSARY TO THE STATE'S LEGITIMATE INTEREST IN ENSURING ATTORNEY COMPETENCE AND FITNESS.

The North Carolina reciprocity provisions consist of two parts. The first is the basic reciprocity requirement that North Carolina will admit to its bar without a required bar examination a lawyer licensed in another state if, but only if, that other state does the same for a North Carolina lawyer seeking admittance to its bar (the "place-of-admission requirement"). The second is the additional requirement that the lawyer must actively have practiced *in the reciprocity state* for at least four of the last six years preceding the application to be admitted to the North Carolina bar without examination (the "place-of-practice requirement").

ACC submits that both provisions are at issue here under the Fourth Circuit's decision. The court of appeals, while purporting to treat them as separate issues, in fact conflated them. Thus, while the court disclaimed deciding the constitutionality of the basic place-of-admission reciprocity requirement (Pet. App. 3 n.1), its stated rationale for expressly upholding the place-of-practice requirement was entirely and exactly that reciprocity itself is valid. *See id.* at 6-8. Accordingly, the decision below effectively passed upon both components of the North Carolina reciprocity provisions. In these circumstances, the antecedent place-of-admission requirement as well as the place-of-practice requirement that was explicitly sustained are properly before this Court.

A. States' Bar Admission Systems.

In 2005, of the 50 states and the District of Columbia, approximately 19 jurisdictions required that an attorney who seeks full-time or permanent admission to that state's bar, regardless of the applicant's prior practice or admission in another jurisdiction, take and pass that state's bar examination. *See generally* National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admission to the Bar, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 25-29 (2006) (not inclusive of recent 2006 changes to bar admission requirements).

The remaining jurisdictions provided for admission without examination (also known as "admission on motion," *see Freidman*, 487 U.S. at 61) to certain applicants who have previously been admitted to the bar of another state. Of these approximately 32 jurisdictions, some 13 states allowed attorneys who have previously been admitted to the bar of any other U.S. jurisdiction, and who have been practicing for a prescribed number of years, to apply for admission on motion without having to re-take a bar examination.

The remaining jurisdictions limited admission on motion to those candidates from jurisdictions that permit reciprocity of admission without examination for their lawyers. Of the approximately 23 reciprocity jurisdictions, some 14 states, including North Carolina, required that the applicant have engaged in the active practice of law for a specified number of years *in the state of reciprocity*. Under the laws of the other nine reciprocity states, the location of the applicant's practice need not have been in a reciprocity state.

B. The Design And Effect Of The North Carolina Reciprocity Provisions.

An understanding of the design and effect of the place-of-admission and place-of-practice requirements is crucial for the legal arguments that follow in Section III, *infra*.

1. *Place-of-admission requirement.* North Carolina affords reciprocity to lawyers admitted in *any* other state if, and only if, that state offers reciprocal advantages to North Carolina lawyers requesting admission without examination to its bar. If another state declines, for whatever reason, to enter into a reciprocal arrangement, North Carolina will not permit the other state's lawyers to be admitted on this basis; in thus excluding them, North Carolina does not make any determination of the other state's bar admission standards or the competence of its lawyers to practice in North Carolina. *See* Rhode at 154 ("[i]f experienced out-of-state attorneys are competent to practice, it shouldn't matter how their local bars treat competitors").

Conversely, North Carolina *automatically* allows reciprocity to another state simply upon the other state's grant of reciprocity to North Carolina. Again, North Carolina makes no attempt to determine the stringency of the other state's bar examination, or the competence of its lawyers, or the similarity of the laws of that state to those of North Carolina, or any other factor that would rationally support North Carolina's acceptance of the other state's bar exam and admission as an indication of the competence and character of the lawyer seeking admittance to the North Carolina bar. *See* Perlman at 150. In fact, respondents' website expressly disclaims even knowing at any given time which other states have reciprocity arrangements with North Carolina, directing the viewer to check with the bar authorities in the other states. *See* http://www.ncble.org (follow "comity" hyperlink).

Respondents have candidly acknowledged that the *sole* purpose of this reciprocity requirement is to entice other states to confer reciprocal benefits on North Carolina lawyers. *See* Pet. App. 39. Thus, the North Carolina reciprocity requirement was designed and adopted in order to benefit lawyers licensed in North Carolina, not to protect the public by ensuring the competence and fitness of lawyers seeking admission to the North Carolina bar without examination.

In view of the deficiencies and arbitrariness of state-by-state reciprocity arrangements such as North Carolina's, the ABA Commission on Multijurisdictional Practice recommends that admission without examination be extended to any lawyer who, *inter alia*, has been admitted to practice law in *any* other state, territory, or the District of Columbia for a specified period of time. *See* ABA Report at 47. As the Report elaborates, the recommended provision

> recognize[s] the reality that lawyers who have been admitted to another state's bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state and that, for experienced lawyers, the bar examination [which would be necessary absent reciprocal admission] . . . serves as an unnecessary obstacle to establishing a practice in the new state.

Id. at 48.[2]

2. *Place-of-practice requirement.* In addition to the basic place-of-admission reciprocity requirement, North Carolina also imposes a place-of-practice requirement that the applicant for admission without examination must have actively practiced for at least four of the last six years *in the reciprocity state*. In particular, it is not sufficient that an applicant have been licensed by and actively practicing law in a state for that period preceding his application; rather, he is required to have been engaged in the active practice of law in the specific state that is the basis for his requested admission without examination on the ground of reciprocity. By itself, this provision serves to exclude licensed and competent out-of-state lawyers from admission in North Carolina. *See* Wolfram at 682 ("[m]ost onerous for lawyers who frequently move from state to state is a requirement found in many on-motion states establishing a minimum number of years

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2. Respondent was admitted, by examination, in California, Indiana, and Ohio.

during which the out-of-state applicant must have practiced law in a single jurisdiction"); Needham at 503.

In its evident design and effect, the North Carolina place-of-practice requirement is highly arbitrary and irrational and does nothing to ensure competence and fitness to practice law. For example, there is no comparable requirement for a lawyer who long-ago passed the North Carolina bar exam to retain his eligibility to practice in North Carolina. Such a lawyer might not have practiced law at all for an extended period, or not done so in the six years preceding his application, or practiced for brief periods in various jurisdictions outside North Carolina, or moved away from North Carolina for many years (even to a non-reciprocity state such as California) and then returned to the state; yet, provided only that he satisfied the formal requirements to maintain his bar membership each year, he could resume practice at any point without any inquiry by respondents. *See* Perlman at 158.

Likewise, as petitioner's case demonstrates, this place-of-practice requirement can illogically divest applicants of eligibility for reciprocity admission that they previously established. Mr. Morrison passed the bar exams of, and practiced in, both Indiana and Ohio, which are reciprocity states with North Carolina. If he had applied for admission without examination at that time, he would have qualified. However, because he continued to practice law for approximately 15 years in California (where he also passed the bar exam, but which is not a reciprocity state) and for three years in North Carolina itself, he lost that eligibility. By contrast, a junior lawyer who was admitted and practiced in Indiana or Ohio for four years and then sought reciprocity admission in North Carolina would be accepted. *See* Perlman at 150. Indeed, if Mr. Morrison himself had moved back to Indiana or Ohio and practiced there for four years, he instantly would have regained his eligibility for reciprocity admission in North Carolina. In that circumstance, while his competence to practice law in the state would not have changed, the arbitrary factor of the location of his most

recent practice would determine his admission without examination to the North Carolina bar.

Finally, the North Carolina place-of-practice requirement is starkly protectionist. It does not ensure competence and fitness but simply restricts the out-of-state lawyers who can be admitted without examination in North Carolina and thus compete with in-state attorneys. *See* Pet. App. 7-8.

The ABA Commission on Multijurisdictional Practice avoids these inherent defects in the place-of-practice requirement imposed by North Carolina. It recommends that admission without examination be granted if the applicant practiced for the prescribed period in *any* state, territory, or the District of Columbia. ABA Report at 47.[3] The Commission explains that lawyers who have practiced for such "a significant period of time" in "another state's bar" are "qualified to establish a law practice in the new state." *Id.* at 48.

III. THE NORTH CAROLINA RECIPROCITY PROVISIONS VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES AND THE COMMERCE CLAUSE.

Against this background, it is clear that the North Carolina place-of-admission and place-of-practice requirements violate the Equal Protection and Due Process Clauses and the Commerce Clause.

A. Due Process And Equal Protection.

Equal protection and due process are violated if the provision in question is arbitrary and irrational in relation to the legitimate governmental objective it is drawn to achieve. *See Schware*, 353 U.S. at 238-39 (to "exclude a person from the practice of law," "any [bar] qualification must have a rational connection with the applicant's fitness or capacity to practice law" in order to satisfy equal protection and due process);

3. The Commission recommended a period of practice of five of the preceding seven years.

see also, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 448 (1985); *Zobel v. Williams*, 457 U.S. 55, 60, 61, 65 (1982); *cf. Frazier v. Heebe*, 482 U.S. at 646, 649 (invalidating, under supervisory power, a district-court bar requirement as "unnecessary and irrational"); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (due process). Here, as a matter of law, the only legitimate state interest is to ensure the competence and fitness of reciprocity applicants to practice law. *See* pages 1-2, *supra.* Neither the place-of-admission requirement nor the place-of-practice requirement satisfies this constitutional standard.

1. *Place-of-admission requirement.* As explained above (*see* pages 11-12, *supra*), the basic place-of-admission reciprocity requirement does nothing to ensure competence and fitness to practice law. Rather, North Carolina *automatically* allows reciprocity for *any* other state that grants reciprocity to it. Thus, this requirement does not serve to test the competence of lawyers seeking admission on motion; North Carolina has effectively ceded control over its own bar to the other states with which it has reciprocity relationships. Respondents rejected petitioner's application for reciprocity simply because California, where he passed the bar exam and practiced for approximately 15 years, is not a reciprocity state with North Carolina — and it did so without any determination (or even inquiry) as to whether California's bar admission standards established the professional qualifications of California-admitted lawyers to practice in North Carolina. *See* Perlman at 147 (referring to "[t]he senselessness of rigid rules on interstate law practice"); Wolfram at 679 ("[t]he reasons given for the restrictions [on admitting out-of-state lawyers] are probably largely pious eyewash").

While, of course, "this Court is not well positioned to dictate specific legislative choices to the State, it is sufficient to note that . . . [other] alternatives exist." *Friedman*, 487 U.S. at 69; *see also Piper*, 470 U.S. at 285 n.19. Most obviously, North Carolina could — as 13 other states do and the ABA

Commission on Multijurisdictional Practice recommends — not limit its admission without examination to only some other (self-selected) states but extend it to attorneys admitted and in good standing in any other jurisdiction. Especially with respect to experienced practitioners like Mr. Morrison, that approach would be no less effective in ensuring the competence and fitness of the lawyers admitted and would avoid the arbitrariness and irrationality of North Carolina's current requirement.

Nor is it an answer that applicants could avoid the unconstitutional reciprocity requirement merely by taking the North Carolina bar exam. First, this Court already has rejected the identical argument, holding that such an alternative is "quite irrelevant" because it does not cure the arbitrariness and irrationality of the requirements and distinctions of the North Carolina system. *See Friedman*, 487 U.S. at 66-67. Second, obligating an experienced lawyer to take another bar exam is no "mere" matter. "A bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise." *Id.* at 68. Furthermore, the bar exam, which is designed for new attorneys, is not a meaningful or accurate way to test the competence of an experienced lawyer to practice law and constitutes a needless barrier to admission in another state. *See* ABA Report at 48 ("for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state"); Needham at 456; Rhode at 150-52. Finally, it is cold comfort to require an experienced lawyer who has a national practice, or who works in or has moved among several states, to incur the significant expense and commit the substantial time to take bar exams in each and every one of the jurisdictions necessary to serve his needs and those of his clients. *See* ABA Report at 8, 48.

2. *Place-of-practice requirement.* Likewise, North Carolina's place-of-practice requirement bears no rational relationship to the legitimate state objective of attorney competence and fitness. Rather, as previously demonstrated (*see* pages 12-14, *supra*), it is completely arbitrary and irrational

and utterly fails to ensure that competent out-of-state attorneys are admitted and incompetent ones rejected.

Once again, possible alternatives are readily imaginable. For instance, in line with the practice in approximately nine states and the recommendation of the ABA Commission on Multijurisdictional Practice, North Carolina might simply require that experienced out-of-state lawyers have practiced for a specified period *in any jurisdiction(s)* in which they are admitted (rather than, as North Carolina now does, in a particular jurisdiction). Better yet, North Carolina could dispense with any such place-of-practice requirement altogether and accept that an experienced lawyer who has been practicing anywhere else for years without any problems or complaints is competent to be admitted to its bar. Of course, the Court need not pass upon the constitutionality of such alternatives to grant and ultimately resolve this case. For this purpose, it is sufficient to note that the place-of-practice requirement adopted by respondents is arbitrary and irrational and therefore cannot stand.

B. Commerce Clause.

The petition demonstrates that the North Carolina place-of-admission and place-of-practice provisions violate the Commerce Clause under the decisions of this Court, such as *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), that strike down state reciprocity statutes. *See also* Ronald D. Rotunda, MODERN CONSTITUTIONAL LAW § 3-3 at 121 (6th ed. 2000) (questioning bar reciprocity arrangements after *Great Atlantic*); Jonathan B. Chase, *Does Professional Licensing Conditioned Upon Mutual Reciprocity Violate the Commerce Clause?*, 10 VT. L. REV. 223 (1985).[4]

4. This Court has noted that the Commerce Clause was derived from the same provision of the Articles of Confederation, and serves the like purpose of "creat[ing] a national economic union," as the Privileges and Immunities Clause at issue in *Piper*, *Friedman*, and *Barnard*, and that the two clauses have a '"mutually reinforcing relationship.'" *Piper*, 470 U.S. at 278-80 & n.8.

In addition, these provisions also violate the cardinal Commerce Clause principle that states cannot adopt protectionist measures that advantage in-state interests at the expense of those out-of-state. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Maine v. Taylor*, 477 U.S. 131 (1986).

Under this Court's Commerce Clause precedents, different standards of review apply depending upon the type of state measure at issue. Given that the North Carolina place-of-admission and place-of-practice requirements expressly discriminate between in-state and out-of-state attorneys, there is a substantial argument that heightened scrutiny should obtain here. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("where simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected"). But in any event, the North Carolina provisions fail to pass constitutional muster even under the less stringent standard because they do not serve the legitimate state purpose of attorney competence and arbitrarily, irrationally, and unnecessarily burden out-of-state lawyers.

1. *Place-of-admission requirement.* At first glance, reciprocity in general, by allowing lawyers more easily to enter other states' bars, appears to enhance rather than obstruct interstate law practice and movement by attorneys. However, that rationale does not justify the place-of-admission requirement imposed by North Carolina. *See* Perlman at 149 ("Protectionism is also apparent in the twenty-one jurisdictions that limit admission on motion to lawyers 'from jurisdictions also offering admission on motion.' . . . The primary explanation . . . is to promote the economic interests of the in-state bar") (citation omitted).

First, the North Carolina place-of-admission requirement is avowedly designed to benefit in-state lawyers. By respondents' own admission, the root purpose is to induce other states to admit without examination North Carolina lawyers to their bars

precisely in order to benefit those in-state lawyers. That, however, is irrelevant to the legitimate state interest of ensuring that out-of-state lawyers reciprocally admitted to the North Carolina bar are competent and fit to practice law in the State. Once it is seen that the place-of-admission requirement does not serve that interest, all that remains is the naked protectionist purpose to provide a benefit for North Carolina lawyers engaged in interstate law practice.

In addition, that rationale in no way supports respondents' approach to allow admission without examination to lawyers in only some states rather than all — and indeed in only those states that elect to grant reciprocal admissions to North Carolina lawyers. Once again, that is entirely unrelated to attorney competence and fitness and reveals that North Carolina simply is seeking an economic benefit for its lawyers.

Finally, these vices in the North Carolina place-of-admission requirement easily could be cured, *e.g.*, by allowing experienced attorneys admitted in any other jurisdiction to move for admission without examination in North Carolina. *See* pages 15-16, *supra.*

2. *Place-of-practice requirement.* North Carolina's place-of-practice requirement is facially protectionist. By admitting only those out-of-state lawyers who meet the arbitrary prerequisite that they have actively practiced for four of the last six years in the particular reciprocity state, and thus by excluding other attorneys like petitioner who have demonstrated competence and fitness in the legal profession by their many years of practice in other jurisdictions, North Carolina serves to protect their own in-state bar members against competition from out-of-state lawyers. Furthermore, alternatives exist that would allow North Carolina to ensure the competence and fitness of the out-of-state attorneys it admits without examination and, at the same time, would not disadvantage those attorneys in order to benefit North Carolina lawyers. *See* page 17, *supra.*

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 31, 2006